No. 236.

FILED
FEB 14 18
JAMES H. BROKEN

Brief of Flowers for D. C.

No. 236. October Term, 1897.

Filed Feb. 14, 1898.

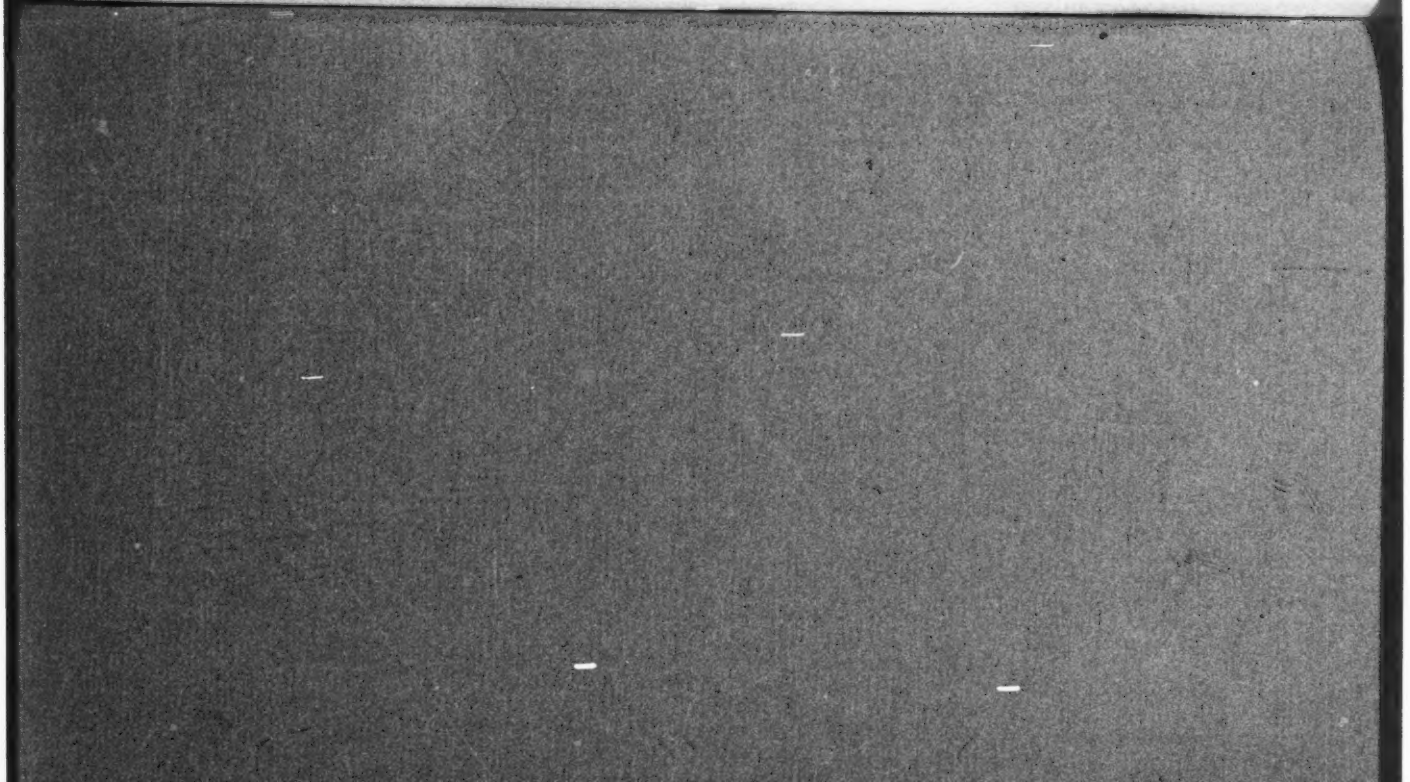
In the Supreme Court of the United States.

THE DETROIT CITIZENS' STREET RAILWAY COMPANY,
Plaintiff in Error,
vs.
THE CITY OF DETROIT, and the DETROIT RAILWAY,
Defendants in Error.

BRIEF FOR THE DEFENDANT THE CITY OF DETROIT.

CHARLES FLOWERS,
Counsel for the City of Detroit.

DETROIT:
THOR. SMITH PRESS.
1898.



In the Supreme Court of the United States.

THE DETROIT CITIZENS' STREET RAILWAY COMPANY,
Plaintiff in Error,
vs.
THE CITY OF DETROIT, and the DETROIT RAILWAY,
Defendants in Error.

BRIEF FOR THE CITY OF DETROIT.

This is an action brought by the Detroit Citizens' Street Railway Company against the Detroit Railway for the purpose of annulling the franchise of the Detroit Railway, granted December 4th, 1894, upon the ground that at the time said franchise was granted, complainant had the exclusive right under a franchise granted to its predecessors February 24th, 1862, to construct and operate lines of street railway upon all the streets of the City of Detroit.

The City of Detroit was made a party to the suit, and is deeply interested in the controversy.

The present population of the City of Detroit is about 300,000. The Citizens' Company operates about one hundred miles of railway lines, occupying the principal business and residence streets and avenues, under a franchise which entitles it to charge five cents for each ride, except for one hour in the morning and an hour in the evening, when it is compelled to sell eight tickets for twenty-five cents. The ordinance does not require the

company to give transfers, except to a very limited extent.

The Detroit Railway owns and operates about sixty miles of railway lines, mostly upon residence streets, which traverse portions of the city which previous to the granting of its franchise, had little or no railway accommodations. It has been estimated that about forty per cent. of the people of the city have access to its lines. The rates of fare which the ordinance requires, are eight tickets for twenty-five cents from 5:30 a. m. to 8 p. m., and six tickets for twenty-five cents during the night, with free transfers upon all of its lines. Basing the annual saving upon the number of passengers carried, as shown by the testimony in this case, it cannot be less than $100,000 per year. Taking into consideration the natural increase of population, the total saving during the life of the franchise will be not less than $10,000,000. To this extent the building of the competing lines of the Detroit Railway has benefited the people of Detroit, and it may therefore well be said that they are deeply interested in the outcome of this controversy.

The original franchise under which the Citizens' Company operates its lines was granted February 24th, 1862, and in the ordinance the grantees were:

"Authorized to construct and operate railways as herein provided through Woodward, Jefferson and Michigan avenue, and through Gratiot and Grand River streets, and from Jefferson avenue through Woodbridge street to Seventh street, and up Seventh street to Fort street, and through Fort street to the western limits of the city, *and through such other streets and avenues in said city as may from time to time be fixed and determined by a vote of the Common Council of the City of Detroit and assented to in writing by said corporation organized as provided in Section 1 of this ordinance.*"

The proposition of the complainant, broadly stated, is that by the ordinance of 1862 the original grantees, and their successor, the Citizens' Company, obtained the exclusive right for all time to come, to operate street railways in the City of Detroit.

They claim that they not only procured such exclusive right to operate street railways upon all the streets which were then laid out within the corporate limits of the city, but upon all streets which might thereafter be laid out, as well as upon all streets which might be established in all additions to the city which might from time to time be made.

More broadly stated, the claim is that the control of this corporation should extend over the boundaries of the City of Detroit as then existing, and also over the townships of Hamtramck, Springwells and Greenfield, portions of which have since that time become a part of the City of Detroit.

More broadly still, the position of the complainant is that by the original ordinance a monopoly was created, by which the possibility of competition should be forever cut off, or made so uncertain as to be an impossibility.

The only questions to be considered are:

First. Had the City of Detroit inherent and original power, without authority conferred upon it by the Legislature, to grant an exclusive privilege to any railway company to own and operate street railways in the city.

Second. If it had no such original and inherent power, has such power been conferred upon it by the Legislature of the State.

As the second proposition is, in my opinion, of more importance, it will be first discussed.

I.

To answer this question in the negative, a reading of the act of the Legislature under which the franchise of February 24th, 1862, was granted, will be necessary.

The company securing the right to operate under the franchise of 1862, was organized under what is called "the train railway act." This act was passed in 1855, and gave no authority for the organization of street railway companies. On February 2d, 1861, about a year before the franchise in question was granted, the act was amended. This amendment is found on page 11 of the Public Acts of Michigan of 1861, and as it is short, I will quote it in full:

"Section 1. The People of the State of Michigan enact: That the act entitled 'An act to provide for the construction of train railways,' approved February 13th, one thousand eight hundred and fifty-five, be amended by adding two new sections thereto, to be numbered thirty-three and thirty-four.

"Sec. 33. It shall be competent for parties organizing companies under this act to construct and operate railways in and through the streets of any town or city in this State.

"Sec. 34. All companies formed for such purposes shall have the exclusive right to use the same: Provided, however, that no such company shall be authorized to construct a railway under this act through the streets of any town or city without the consent of the municipal authorities of said town or city; and under such regula-

tions and upon such terms and conditions as said authorities may from time to time prescribe."

This was the only authority which then existed for the organization of street railway companies, and if the City of Detroit, in February, 1862, had the power derived from the Legislature to grant to any street railway the exclusive rights and privileges for which the complainant contends, that power was derived from Section 34 as I have quoted it, and from no other source.

This section was amended in 1867 so as to read as follows:

"Sec. 34. All companies or corporations formed for such purposes shall have the exclusive right to use and operate any street railways constructed, owned or held by them: Provided, That no such company or corporation shall be authorized to *construct a railway* under this act through the streets of any town or city without the consent of the municipal authorities of such town or city, and under such regulations and upon such terms and conditions as said authorities may from time to time prescribe; Provided further, That after such consent shall have been given and accepted by the company or corporation to which the same is granted, such authorities shall make no regulations or conditions whereby the rights or franchises so granted shall be destroyed or unreasonably impaired, or such company or corporation be deprived of the right of constructing, *maintaining and operating such railway in the street in such consent or grant named*, pursuant to the terms thereof."

The amendment changes the first sentence of the section so as to make it better understood, and adds a proviso at the end of the section.

The original section 34, read in connection with section 33, simply means that railway companies organized under this act shall have the exclusive right to construct

and operate their own railways. The language being indefinite, the amendment of 1867 made it clear. That is to say: "All companies or corporations formed for such purposes shall have the exclusive right to use and operate any street railway constructed, owned or held by them." And in order to secure this right, they could not construct a railway through the streets of any town or city without the consent of the municipal authorities of such town or city, *and under such regulations and upon such terms and conditions as said authorities may from time to time prescribe.*

The language of the section gives the company receiving the grant the exclusive right to use and operate its own railways; that is, that no other company shall have the right to use its railway or run its cars over its tracks.

There being no limitation in this section upon the power of the municipal authorities of the City of Detroit to make such regulations and prescribe such terms and conditions as they might see fit, and evidently for the purpose of protecting the railway companies, in 1867, five years after the grant in question, the proviso was added, which for emphasis I here repeat:

"Provided further, That after such consent shall have been given and accepted by the company or corporation to which the same is granted, such authorities shall make no regulations or conditions whereby the rights or franchises so granted shall be destroyed or unreasonably impaired, or such company or corporation be deprived of the right of constructing, maintaining and operating such railway *in the street in such consent or grant named*, pursuant to the terms thereof."

That is, after the municipal authorities have granted to a railway company the exclusive right to operate its own railway in the streets named in the grant, such authorities shall make no regulations or conditions gov-

erning the operation of the road whereby such rights in the streets named shall be destroyed or unreasonably impaired.

In order to comply with the conditions of Section 34, the ordinance must designate the streets upon which the company may operate.

The claim of the complainant is that the original ordinance of 1862 gave the right to operate a railway upon all the streets of Detroit, and that the grant of the right to the Detroit Railway to construct tracks upon certain streets "destroyed and unreasonably impaired" the rights and franchises of the complainant.

A closer examination of Section 34 will disclose the fact that the proviso contained in the last clause of the section is a proviso that has two purposes: 1st, That the municipal authorities shall make no conditions or regulations whereby the rights granted shall be destroyed or unreasonably impaired; and 2d, That such company shall not be deprived of the right to construct, maintain and operate such railway *in the street in such consent named.*

The regulations and conditions referred to are regulations and conditions which must apply to the operation of the road; and not only shall no such regulations and conditions be from time to time made by the municipal authorities, but such municipal authorities shall not deprive the company or corporation of the right to construct, maintain and operate such railway in the streets named in the grant, or in the manner and according to the terms of the grant.

The power which the Legislature conferred upon the Council, then, was limited by the provisions of Section 34, herein quoted; and that power simply gave the Council the right to make an agreement with a railway company

to operate street cars upon certain streets named in the contract or license.

The question propounded is fully answered in the negative: No power has been conferred upon the City of Detroit by the Legislature of the State to grant an exclusive privilege to any company to own and operate street railways in that city.

This was decided by Judge Frazer, of the Circuit Court for the County of Wayne, denying the relief prayed for by complainant.

Record, p. 464.

The Circuit Judge says:

"I am of the opinion that the Constitution of the State does not give to the City of Detroit any such power, and that there can be no such power exercised by the municipality unless conferred by the Legislature. The rights claimed to have been granted to the complainant by the terms of the ordinance of February 24th, 1862, in my opinion would be of no force and effect unless the authority to grant the same had been conferred upon the Common Council by some act of the Legislature. No such act has been shown and therefore it follows that the ordinance in this respect is void and of no effect."

But it may be said that although special authority had not been conferred by Section 34 of the train railway act, such authority may have been conferred by the charter of the city.

The charter which was in force in 1862 was the charter of 1857, being act No. 55 of the Public Acts of 1857.

Section 22 of that charter enumerates the powers which the Common Council shall have "within the limits and jurisdiction of the corporation;" and the thirteenth subdivision of said section is as follows:

"To clean the highways, streets, avenues, lanes, alleys, public grounds and squares, crosswalks and sidewalks, in said city, of filth, mud and other substances; to prohibit and prevent the incumbering thereof with boxes, signs, posts and all other materials or things whatsoever, and to remove the same therefrom; to prevent the exhibition of signs on canvas, or otherwise, in and upon any vehicle, standing or traveling upon the streets of said city; to control, prescribe and regulate the mode of constructing and suspending awnings, and the exhibition and suspension of signs therein; to compel the occupants of lots to clear the sidewalks in front of and adjacent thereto, of snow, ice, dirt, mud, boxes and every incumbrance or obstruction thereon; *to control, prescribe and regulate the manner in which the highways, streets, avenues, lanes, alleys, public grounds and spaces within said city shall be used and enjoyed;* to direct and regulate the planting and to provide for the preservation of ornamental trees therein; to provide for and regulate the lighting of the same, and the erection of lamps and lamp posts therein; to prohibit and prevent racing, and fast or dangerous driving or riding therein; to prohibit and prevent the flying of kites, and all practices, amusements and doings therein having a tendency to frighten teams and horses, or dangerous to life or property; to remove or cause to be removed all walls and other structures that may be liable to fall therein, or otherwise, so as to endanger life or property."

It will be seen that the general power over streets is defined by the words "*to control, prescribe and regulate the manner in which the highways, streets, avenues, lanes, alleys, public grounds and spaces within said city shall be used and enjoyed.*"

This provision is the ordinary provision contained in city charters in reference to streets and public places. The "control" referred to is a continuing control, and must be exercised from day to day. The "regulation" is

a continuing regulation or supervision. The streets, at the time this charter was adopted were for a public use and a public enjoyment.

This was the opinion of those interested in the building of street railways when they secured the amendment to the train railway act, by which power was conferred upon the municipal authorities to permit the use of the streets for that purpose.

The opinion of Justice Jackson, in the case of the Grand Rapids Electric Light & Power Co. vs. Grand Rapids Edison Electric Light & Fuel Co., 33 Fed. Rep., 659, can well be considered at this point as bearing upon the powers conferred by charter to a municipality in Michigan.

On page 663 of the opinion the learned justice quotes from the charter of Grand Rapids. The thirty-fifth section of the charter is analogous to the provision of the Detroit charter of 1857 which I have quoted, and contains these words:

"To control, prescribe and regulate the manner in which highways, streets, avenues, lanes, alleys, public grounds and spaces within said city shall be used."

The masterly opinion of Justice Jackson, a logical examination not only of the express, but of the implied powers which our opponents imagine exist in the local authorities of Michigan cities to create an exclusive privilege, leaves nothing to be said upon the questions involved in this case.

The City of Grand Rapids in 1880 gave the complainants the exclusive right to erect poles and string wires in that city for fifteen years. In 1887 the city gave defendants the same privilege, but not exclusively.

I will be pardoned for quoting from the opinion, on page 670:

"To confer *exclusive* rights and privileges, either in the

streets of a city or in the public highways, *necessarily involves the assertion and exercise of exclusive powers and control over the same.* Nothing short of the *whole sovereign power* of the state can confer exclusive rights and privileges in public streets, dedicated or acquired for *public* use, and which are held in trust for the *public at large.* This brings us directly up to the inquiry whether the Legislature of Michigan has delegated to the City of Grand Rapids the state's sovereign power and control over the streets of that municipality. If the charter powers of the city have invested it or its common council with the *whole sovereign* power and exclusive control over the streets within its limits, it might lawfully confer upon the complainant the exclusive right of user, which the ordinance of 1880 undertook to grant. If, however, the city or its common council possessed no such exclusive power and control, then the grant which it attempted to make to complainant was '*ultra vires*,' and therefore void, so far as it purports to confer exclusive privileges in or over the streets of the city."

No authority having been given in direct terms, can it be claimed that such power was given to the city by implication?

Before examining the question of whether any such implied power is contained in Section 34, before quoted, let us for a moment call to mind the well-known rule acknowledged by all courts and law writers, that nothing is to be taken by intendment in construing a legislative grant of power.

As was said by the Supreme Court of Pennsylvania, in Railroad vs. Canal Commissioners, 21 Pa. St., 22:

"When a state means to clothe a corporate body with a portion of her own sovereignty and to disarm herself to that extent of the power that belongs to her, *it is so easy to say so, that we will never believe it to be meant when it is not said.* In the construction of a charter, to be in doubt, is to be resolved; and every resolution which springs from doubt is against the corporation."

But laying aside that rule for a moment, can it be even suggested that it was the intent of the Legislature by Section 34 to confer upon the City of Detroit the power to grant an exclusive right to any company in any streets not named in the grant, or even to give to any company an exclusive option or exclusive privilege which the company might exercise in the future at its own will?

I desire in this connection to ask the attention of the Court to the case of Wright vs. Nagle, 101 U. S., 791.

The case is cited by complainant's counsel as authority for the jurisdiction of this Court to review the judgment of the Supreme Court of Michigan. We accept it for authority for more than complainant claims.

In that case the inferior court granted to Miller, his heirs and assigns forever, the exclusive right of operating ferries across the Etowah river at Rome, Georgia. The right was granted in 1851. In 1872 the commissioners of roads authorized Nagle to erect and maintain a toll bridge over the same river, within the limits of the original grant.

Wright became the successor of Miller, and asked that the grant to Nagle, being repugnant to the Constitution of the United States, be annulled and declared void.

The power given by the Legislature of Georgia to the inferior courts of the several counties to establish bridges and ferries was so clear that there was some reason for

the argument that the right to grant exclusive privileges had been intended.

The superior court decided that the inferior court had no power to grant Miller any such exclusive right, and the bill was dismissed. This decision was affirmed by the Supreme Court of the State, and an appeal was taken to the Supreme Court of the United States.

The principles involved in that case and the present one are so analogous that I quote from the opinion of Chief Justice Waite, page 796.

After referring to the statutes by which it was claimed authority was given to the inferior court to make the contract in question, the Chief Justice said:

"It is conceded that these statutes contain all the authority the inferior court of Floyd county had to make the contract in question. Exclusive rights to public franchises are not favored. If granted, they will be protected, but they will never be presumed. Every statute which takes away from a legislature its power will always be construed most strongly in favor of the State. These are elementary principles. The question here is whether the Legislature of Georgia conferred on the inferior courts of its several counties the power of contracting away the right of the State to establish such ferries and bridges in a particular locality as the ever-changing wants of the public should in the progress of time require. In our opinion it did not. It gave these courts the right to *establish* ferries or bridges, but not to tie the hands of the public in respect to its future necessities. *The right to establish one bridge and fix its rate of toll does not imply a power to bind the State or its instrumentalities not to establish another in case of necessity.*"

As bearing upon the intention of the Legislature to grant to the Common Council of Detroit the power to confer exclusive privileges, let us examine the charters of the city previous to 1857.

The only provision which I have been able to find which gives the municipal authorities of the city power to confer an exclusive right or privilege, is found on page 20 of the Revised Charter and Ordinances of 1855.

This appears to have been a provision contained in charters previous to this date.

Among other powers conferred upon the Common Council by these early charters is the following:

"Relative to the supplying of the said City of Detroit with pure and wholesome water, by contract or otherwise, *and to grant such exclusive right to any person or persons willing to contract for supplying water as aforesaid.*"

This provision, however, was repealed by an act of February 14, 1853, when the Board of Water Commissioners was created.

This reference is suggestive. It shows that the question of exclusive rights was considered by the Legislature, and the power conferred only in this single instance. It was a power conferred for the benefit of the whole people of the city, and directly affected the life and health of every man, woman and child. Whether the full power given was ever exercised, I cannot say, but in 1853 the Legislature took away from the City of Detroit the authority which had been conferred upon it, and lodged it in a board created expressly for that purpose, and clothed

said board with power to construct water works and issue bonds and collect water rates.

It appears that the sovereign power of the State, from 1853 to the present time, did not consider that it had abdicated its authority and control over public highways of the State, when those highways were embraced within the corporate limits of a city.

It will thus be seen, from an examination of all the acts and charters in relation to the City of Detroit, that no power was ever conferred upon the municipality by the Legislature to grant the exclusive privilege which the complainant claims.

This was the conclusion reached by the Supreme Court of Michigan in this case. I quote from the opinion of Justice Montgomery, at page 470 of the record:

"It is apparent from the reading of the statute that there was no express or direct authority conferred in terms upon the Common Council to grant an exclusive privilege to occupy the streets of the city for street railway purposes."

I understand that it is the rule of this court to follow the decisions of the Supreme Courts of the States, in their construction of state statutes.

II.

It is claimed, however, by the complainant, that the City of Detroit had the sovereign power, original and inherent, as a municipality of Michigan, to grant the exclusive right contended for.

The contention is that the sovereign power of the State of Michigan over the public highways of the State has been cut up into small pieces and sown broadcast over the State, so that in each township, town and city a new sovereignty has taken root and grown up, independent, arbitrary and omnipotent.

If we read the statutes and charters and decisions of the State aright, this doctrine has been a kind of sleeping beauty. Legislatures have met and adjourned, statutes and charters controlling, limiting, defining, enlarging and narrowing municipal powers have been passed by the hundreds, and none of the Legislatures for the past fifty years have imagined that they were interfering with the rights or prerogatives of the little sovereigns.

The courts of the state, ignorant of the existence of this hidden and guarded sleeper, from term to term and from year to year have continued to render judgments and pronounce decrees contrary to such a doctrine.

For the purpose of sustaining this remarkable contention, announced for the first time in this case as an inducement to obtain a decree in favor of a monopoly, the learned counsel has quoted portions of three sections of the Constitution of the State.

Let us examine those sections in the order in which they are quoted on page 25 of complainant's brief.

"The State shall not be a party to or interested in any work of internal improvement, nor engaged in carrying on any such work, except in the expenditure and granting to the State of land or other property."

Therefore, according to the reasoning of counsel, it was not necessary for the Legislature to pass acts regulating the manner in which street railways could acquire rights to occupy the streets of a city.

"There shall be elected annually, on the first Monday in April in each township, one commissioner of highways and one overseer of highways in each district."

Therefore the Common Council of the City of Detroit could give to John Brown, his heirs and assigns forever, the right to run railway cars through all the streets of the city.

"The Legislature shall not revoke or alter any road laid out by the commissioner of highways, or any street in any city or village or in any recorded town plat."

Therefore, the Common Council of the City of Detroit, having granted to John Brown and his assigns a license in 1862, for thirty years, to operate cars upon certain streets named in the license, it will not be competent for another Common Council, in 1894, thirty-two years after the first license, to grant to any other parties the right to run cars upon other streets, not in existence at the time the first license was granted.

The cases which the counsel for complainant cite in their brief in support of the doctrine of local control, are Hubbard vs. Springwells, 23 Mich., 153; Davis vs. Supervisors, 89 Mich., 295; People vs. Hurlbut, 24 Mich., 44; Park Commissioners vs. Common Council, 28 Mich., 228; Atty. Gen. vs. Common Council, 29 Mich., 108.

The same cases were referred to in complainant's brief in the Supreme Court of Michigan, and were cited by Justice Montgomery in his opinion, and were shown by him to be clearly inapplicable to the case at bar. For an analysis of them I refer to the opinion of the learned judge, found on pages 472 and 473 of the Record.

No stronger point can be made by me than to quote the same language quoted by Justice Montgomery from the opinion of Justice Cooley, in Park Commissioners vs. Common Council, 28 Mich., 239.

After stating that the opinion in People vs. Hurlbut, had been misapprehended, Judge Cooley said:

"We intended in that case to concede most fully that the State must determine for each of its municipal corporations the powers it should exercise and the capacities it should possess, and that it must also decide what restrictions must be placed upon these, as well to prevent clashing of action and interest in the State as to protect individual corporators against injustice and oppression at the hands of the local majority; and what we said in that case we here repeat, that while it is a fundamental principle in this State recognized and perpetuated by express provisions of the constitution that the people of every hamlet, town and city of the State are entitled to the benefits of local self-government, the constitution has not pointed out the precise extent of local powers and capacities, but has left them to be determined in each case by the legislative authority of the State from considerations of general policy, as well as those which pertain

to the local benefit and local desires; and in conferring those powers it is not to be disputed that the Legislature may give extensive capacity to acquire and hold property for local purposes or it may confine authority within the narrow bounds, and what it thus confers it may enlarge, restrict or take away at pleasure."

In their eagerness to discover in the Constitution of Michigan a few phrases which a brilliant fancy might dream to have some cabalistic meaning, counsel for complainant have ignored Article IV., Section 38, of the Constitution, which reads:

"The Legislature may confer upon organized townships, corporate cities and villages and upon boards of supervisors of the several counties, such powers of a local legislative and administrative character as they may deem proper."

As stated by Justice Montgomery, "The limitations upon this broad power to confer or withhold authority are that the Legislature may not withhold authority from the local authorities and confer it upon an outside agency, and under the provisions of Article IV., Section 23, it may not vacate or alter any road laid out by the commissioner or local authorities."

It must follow, as decided by the courts of Michigan, that:

"The power of a municipality to grant an easement in a street to a street railway company, is not inherent, but is derived from the Legislature."

It must therefore follow that the alleged contract or option under which complainant claims such extraordinary rights and special privileges, was void.

CHAS. FLOWERS,
For the City of Detroit.

Supreme Court of the United States

October Term, 1898.

No. [illegible]

THE DETROIT CITIZENS' STREET RAILWAY COMPANY,

Plaintiff in Error

against

THE DETROIT RAILWAY and THE CITY OF DETROIT

ADDITIONAL BRIEF FOR THE DEFENDANT THE CITY OF DETROIT.

PHILIP A. ROLLINS,
JOSEPH H. CHOATE,
Of Counsel.

C. A. Montgomery, Printer and Copper Plating, N. Y.

In the Supreme Court of the United States.

THE DETROIT CITIZENS' STREET RAILWAY COMPANY,
Plaintiff in Error,

AGAINST

THE DETROIT RAILWAY and THE CITY OF DETROIT,
Defendants in Error.

ADDITIONAL BRIEF FOR THE DEFENDANT THE CITY OF DETROIT.

Statement of the Case.

On December 4th, 1894, the Common Council of the City of Detroit passed an ordinance authorizing the defendant the Detroit Railway to lay tracks and operate railways through certain streets in that city.

On January 14th, 1895, the complainant, who in this Court is the plaintiff in error, filed a bill in equity on the chancery side of the Michigan Circuit Court for the County of Wayne praying that the City of Detroit and the defendant railway company might be enjoined from executing or proceeding under the ordinance just mentioned.

The complainant is the successor to the Detroit City Railway Company, and as such is the holder of whatever rights were vested in that company by virtue of an ordinance of the Common Council of Detroit, approved November 24th, 1862. And it contends that by the terms of that ordinance it holds such exclusive right to build street railways in the City of Detroit as to preclude the defendant

railway from operating, and the defendant city from granting to it any rights to operate, street railways within the city limits.

This ordinance of 1862 will be found on page 12 and following of the printed record. By its second section the grantees are exclusively authorized to construct and operate railways through certain named streets and avenues, "and through such other streets and avenues in said city as may from time to time be fixed and determined by vote of the Common Council of the said City of Detroit and assented to in writing by said corporation organized as provided in Section first of this ordinance; and provided the corporation does not assent in writing within thirty days after the passage of said resolution of the council ordering the formation of new routes, then the Common Council may give the privilege to any other company to build such route."

By the twentieth section of the ordinance the powers and privileges conferred by the ordinance, were limited to a period of thirty years from the date of its passage, but by a further ordinance, approved November 14th, 1879, found at page 19 of the printed record, were extended for a period of thirty years from the latter date.

The Circuit Court dismissed complainant's bill, and on appeal, its decree was unanimously affirmed by the Supreme Court of Michigan. The case was then removed to this Court by writ of error.

None of the streets or avenues through which the defendant The Detroit Railway was authorized to construct its road by the ordinance of 1894 are named in the ordinance of 1862. It is, therefore, clear that the appellant cannot secure a reversal of the decree below unless it can establish:

FIRST. That the ordinance of 1862 conferred upon its predecessor the exclusive right to construct railroads in all the streets of the City of Detroit; and

SECOND. That the Common Council of the City of Detroit had legal authority to enact an ordinance giving such exclusive right to the Detroit City Railway Company.

The Courts below did not consider at length the question as to what interpretation should be given to the ordinance of 1862, but based their decisions on the ground that even if the construction put upon the ordinance by the complainant were correct, the Com-

mon Council of the City of Detroit had no lawful authority to grant such exclusive privilege under the laws of the State of Michigan.

ARGUMENT.

I.

The ordinance of 1862, if it were construed to grant to the Detroit City Railway the exclusive right to construct and operate street railroads in all the streets of the city, would be void to that extent for the reason that the City of Detroit had no power to confer any such exclusive right.

The city has no proprietary rights in the streets. Its power over them is a legislative power held in trust for the benefit of the public. It is a continuing power to be exercised from time to time as the public interests may require, and except in so far as the city is specially authorized by the Legislature, the city is impotent to part with, diminish or limit this power by contract, or grant, or in any other way. Any contract attempted to be made having such effect is void. The power remains in the city, to be exercised in the same manner and to the same extent as if such contract had not been attempted.

These propositions are so thoroughly established that it seems needless to cite authority in their support.

The complainant recognizing this and being confessedly unable to find any statute passed by the Legislature of Michigan conferring such authority upon the Common Council of the City of Detroit, asserts that the authority of the city to grant rights in the streets to street railway companies is derived from the Constitution of the State independent of any grant by the Legislature.

The sole provisions of the Constitution upon this subject are:

> Section 9 of Article 14, which provides that "The State shall not be a party to, or interested in, any work of internal

improvement, nor engaged in carrying on any such work, except in the expenditure of grants to the State of lands, or other property."

Section 23, Article 4, which provides "The Legislature shall not authorize, by private or special law, the sale or conveyance of any real estate belonging to any person; nor vacate or alter any road laid out by Commissioners of Highways, or any street in any city or village, or in any recorded town plat."

Sections 13 and 14 of Article 15 which are as follows:

"SEC. 13. The Legislature shall provide for the incorporation and organization of cities and villages, and shall restrict their powers of taxation, borrowing money, contracting debts and loaning their credit."

"SEC. 14. Judicial officers of cities and villages shall be elected, and all other officers shall be elected or appointed at such time and in such manner as the Legislature may direct."

And Section 38, Article 4, which is as follows:

"SEC. 38. The Legislature may confer upon organized townships, incorporated villages and cities, and upon the Boards of Supervisors of the several counties, such powers of a local, legislative and administrative character as they may deem proper."

These provisions of the Constitution have been many times considered by the Supreme Court of Michigan, and the unvarying decision of that Court is that the proper instrumentality, under the Constitution, for making public improvements and for the control of municipal affairs is a municipal corporation.

People vs. Supervisors Ingham County, 20 Michigan, 102.
People vs. Hulbert, 24 Mich., 44.
Auditor General vs. Lothrop, 24 Mich., 235.
Hubbard vs. Township Spring Wells, 25 Michigan, 153.
Board of Park Commissioners vs. Detroit, 28 Mich., 228.
Atty. General vs. Common Council of Detroit, 29 Mich., 108.
Atty. General vs. Common Council of Detroit, 58 Mich., 213.
Metropolitan Police vs. Board of Auditors, 68 Mich., 576.
Davies vs. Board of Supervisors, 89 Mich., 295.

Taylor vs. Street Ry. Co., 80 Mich., 77.
City of Detroit vs. Detroit Citizens' Street Ry. Co. *et al.*, 64 Fed. Rep., 628 at 642.

But none of the cases holds that the city has any power other than such as is conferred upon it by grant of the Legislature.

As regards these provisions of the Constitution, we contend that the acts which they prohibit the Legislature from performing in reference to municipal affairs, the Legislature may authorize a city to perform, *and that unless a city is expressly authorized thereto by an act of the Legislature such acts cannot be done by that city.*

Section 9 of Article 14 and Section 23 of Article 4 above quoted are exclusively inhibitory. They declare what the State shall not do.

Section 13 of Article 15 calls for effective action. It says that the Legislature *shall* provide for the incorporation and organization of cities and villages. Section 14 enacts that the officers of these cities and villages shall be elected or appointed at such time and in such manner as the Legislature may direct, while Section 38 of Article 4 provides that the Legislature may confer upon organized townships, incorporated villages and cities "*such powers of a local legislative and administrative character as they may deem proper.*"

The question as to the source from which municipal corporations of Michigan derive their powers has been so frequently considered by the Supreme Court of that State, resulting in the uniform and established doctrine that they have and can exercise no powers except such as they derive from the Legislature, and the whole subject is so thoroughly reviewed in the opinion of the Supreme Court (Printed Record, pp. 471-473), that we shall not presume to amplify or add to the statement of the law there set forth and ending with the proposition which is fatal to the appellant's contention, "that municipal corporations have no power to grant exclusive rights to street railway, gas or water companies, *except upon authority from the Legislature.*"

We assume that in the consideration of such a subject the decisions of the State Court as to the purpose and effect of the Constitution, even if not conclusive upon this Court, should nevertheless be most carefully considered.

Fallbrook Irrigation District vs. Bradley, 164 U. S., 112, 160.

And, as the Supreme Court of Michigan has well said in its decision of this particular case (Printed Record, p. 473):

> " It is, however, strenuously urged upon us that in view of the general policy in favor of local self-government, which is evidenced by the provisions of the constitution quoted and the decisions of this court, the grant to the municipality by the legislature should receive a construction more liberal than if it were a delegation of power which the legislature could itself exercise, it being urged in the same connection that the legislature could not grant an easement or right to use a particular street for street-railway purposes. Without affirming or denying the latter proposition, we do not think the precedent contention would be solved by a determination of that question. *It is clear that whatever power the local authorities have to grant an easement in the street for street-railway purposes is derived from the legislature.* Whether the streets of a city be directly controlled by the legislature in such sense that a direct grant may be made, or whether the trust be one which may be executed through certain local authorities only; the reasons for construing a grant of authority with strictness are equally forcible. Whether such a franchise be the subject of a grant by the state direct or by the local authorities, the power over the streets is a trust, and the authority to grant an exclusive right ought not to be implied any more because the legislature has not reserved to itself or does not originally possess the power to grant an easement in a particular street."

According to these provisions of the Constitution above quoted it seems entirely clear that such power as the Legislature has not deemed proper to confer upon cities and villages the cities and villages do not possess. This point is expressly decided in the case of Taylor vs. The Street Railway Company, 80 Michigan, 77. The question there discussed was the power of a municipal corporation to grant rights to a street railroad company. At page 82 the Court says :

> " It becomes, therefore, important to determine the power conferred by the Legislature upon the Common Council of Bay City. The council can, of course, confer no greater

right upon the defendant than is authorized by its charter. Municipal corporations derive their sole source of power from *legislative enactments.* The rule has been long and unquestionably established that municipal corporations are limited to those powers which are granted :

"1. In express words. 2. Necessarily incident to the powers expressly granted. 3. Those which are essential and indispensable to the declared objects and purposes of the corporation.

1 Dillon Municipal Corporations, Section 89.

"* * * The power to grant immunity to such corporations from legislative regulation and control is an important one. A village of a few hundred inhabitants may, in much less than thirty years, grow to a city of many thousands. Bay City well illustrates this fact. What in the one would cause no damage might in the other cause great damage. The village council cannot well provide regulations and ordinances applicable to a large city. It is, therefore, highly important that the Legislature should retain the power to pass enactments for the control of these *quasi*-public corporations suitable for the changed state of affairs. These who claim immunity from such control must be able to point to the clear enactment of the statute establishing it."

Section 24 of the Train Railways Act (Laws of Michigan, 1861, p. 12) gives any corporation formed for the purpose of operating a railway through the city streets the exclusive right to use and operate any *street railways constructed, owned* or *held* by them, provided the consent of the municipal authorities is first procured. This is the whole extent of the power of the city to make any grant of rights in the streets to the company, and it cannot be enlarged by implication. The further provision of the act that, if such consent shall have been given and accepted, such authorities shall make no regulations whereby the company shall be deprived of the right of constructing, maintaining and operating such railway in the street in such consent or grant named, does not apply in the present case.

If the draughtsman of the act could have anticipated the claim which the plaintiff in error now makes, he could hardly have used more apt language to prevent the complainant's success. The pro-

hibition upon the municipal authorities to deprive any corporation of its rights is expressly limited to rights *in the street in such consent or grant named.*

II.

The construction which is required to be given to statutes which confer upon corporations rights and franchises precludes the claim that the City of Detroit had power under the charter of the city or under the street-railroad statutes to grant the exclusive right claimed by the plaintiff in error.

The law is that statutes by which rights and franchises are conferred, or are authorized to be conferred, upon corporations, are in all cases strictly construed in favor of the public and against the corporations. A grant of an exclusive right in the streets is not made nor authorized to be made unless such grant or authority is given in express and explicit terms.

This doctrine has been so many times asserted by this Court that citations seem almost impertinent.

In Oregon Railway Co. vs. Oregonian Railway Co., 130 U. S., Mr. Justice MILLER, in delivering the opinion of the Court, says (at p. 26):

> "It is to be remembered that where a statute making a grant of property, or of powers, or of franchises to a private individual, or a private corporation, becomes the subject of construction as regards *the extent of the grant*, the universal rule is that in doubtful points the construction shall be against the grantee and in favor of the Government or the general public. As was said in the case of Charles River Bridge vs. Warren Bridge, 11 Pet., 420, 'in this Court the principle is recognized that in grants by the public nothing passes by implication' (See, also, Dubuque and Pacific Railroad Co. vs. Litchfield, 23 How., 66; Turnpike Co. vs. Illinois, 96 U. S., 63)."

The same question is again considered in Central Transportation Co. vs. Pullman's Palace Car Co., 139 U. S., 24. At page 49 the Court says:

> "By a familiar rule every public grant of property, or of privileges or franchises, if ambigious, is to be construed against the grantee and in favor of the public; because an intention, on the part of the government, to grant to private persons, or to a particular corporation, property or rights in which the whole public is interested, cannot be presumed, unless equivocally expressed or necessarily to be implied in the terms of the grant; and because the grant is supposed to be made at the solicitation of the grantee, and to be drawn up by him or his agents, and, therefore, the words used are to be treated as those of the grantee; and this rule of construction is a wholesome safeguard of the interests of the public against any attempt of the grantee, by the insertion of ambiguous language, to take what could not be obtained in clear and express terms (Charles River Bridge vs. Warren Bridge, 11 Pet., 420, 544–546; Dubuque & Pacific Railroad vs. Litchfield, 23 How., 66, 88, 89; Slidell vs. Grandjean, 111 U. S., 412, 437, 458). This rules applies with peculiar force to articles of association, which are framed under general laws, and which are a substitute for a legislative charter, and assume and define the powers of the corporation by the mere act of the associates, without any supervision of the Legislature or of any public authority (Oregon Railway vs. Oregonian Railway, 130 U. S., 26, 27)."

The same question was before the United States Circuit Court of Appeals in the case of the City of Detroit against the Detroit Citizens Street Railway Co., 64 Fed. Rep., 628. In the course of its opinion the Court, after considering the provisions of the Constitution above quoted, said (at p. 642):

> "It is impossible to draw from these provisions any recognition of inherent or ungranted authority in either the townships, villages or cities of Michigan. That they do have the effect to limit materially the ordinary powers of legislatures over the purely local affairs of such communities is most obvious.

> It is equally obvious that in regard to purely local affairs the legislature can only act by conferring discretionary power in regard to such subjects upon the local authorities. *If the legislature wishes to confer or withhold such power it may do so. If it shall deem such powers expedient, it may confer them with such limitations as it shall deem wise.*"

No power over the management of street railroads had been specifically conferred by the Legislature of Michigan upon the Common Council of the City of Detroit up to the time of the passage of the ordinance of 1862 under which the plaintiff in error asserts its claims. The only statutes of Michigan on the subject are contained in Sections 33 and 34 of the Train Railway Act as amended, being Sections 3526 and 3527 of Howell's Statutes, and Sections 13, 14 and 29 of the General Street Railway Act, being Sections 3548, 3549 and 3564 of Howell's Statutes.

These sections of the Train Railway Act are as follows:

> "SEC. 33. It shall be competent for parties to organize companies under this act to construct and operate railways in and through the streets of any town or city in this State.
>
> "SEC. 34. All companies or corporations formed for such purposes shall have the exclusive right to use and operate any street railways constructed, owned or held by them; provided, that no such company or corporation shall be authorized to construct a railway under this act through the streets of any town or city without the consent of the municipal authorities of such town or city and under such regulations and upon such terms and conditions as said authorities may from time to time prescribe: Provided, further, that, after such consent shall have been given and accepted by the company or corporation to which the same is granted, such authorities shall make no regulations or conditions whereby the rights or franchises so granted shall be destroyed or unreasonably impaired, or such company or corporation be deprived of the right of constructing, maintaining and operating such railway in the street in such consent or grant named, pursuant to the terms thereof."

The provisions of the other statute are, in effect, the same.

In the Street Railway Co. of Grand Rapids vs. The West Side Street Railway Co. of Grand Rapids *et al.*, 48 Michigan, at 436, the

Court, referring to the provisions of Section 29 of the General Street Railway Act (Sec. 3564 of How. St.), say:

> "The act also, by its language, brought all existing companies within its conditions, and compelled all future companies to conform to it."

These provisions of the two acts are that a street railroad company may construct and operate a street railroad on the streets of the city with the consent of the city, which consent is to be given under such regulations, terms and conditions as it may deem proper to impose as the condition of its assent.

This is the whole extent of the power of the city to make any grant of rights in the streets to the company.

When it has given its consent under the Train Railway Act, it

> "shall make no regulations or conditions whereby the rights or franchises so granted shall be destroyed or unreasonably impaired, or such company or corporation be deprived of the right of constructing, maintaining and operating such railway in the street in such consent or grant named, pursuant to the terms thereof."

When it has given its consent under the General Street Railway Act, "as in this act provided," the city "shall not revoke such consent nor deprive the company of the rights and privileges so conferred."

What the city is authorized to grant is clearly expressed in the terms of the Train Railway Act to be its consent to the street railway company "to construct a railway" through the streets of the city.

Under the General Street Railway Act it is to grant its consent to any street railway corporation to "construct, use, maintain and own a street railway for the transportation of passengers in and upon the lines of such streets and ways as shall be designated and granted from time to time for that purpose."

There is no authority expressed, or indicated in any manner, that the city can grant an exclusive right, or grant its consent to an exclusive right, to the company in the streets. Its power to grant and the whole of the grant which it can make are defined by the statute, and it is its consent simply to a company to construct a railway in the streets. What is its power to grant? Its consent.

What consent? Its consent to construct or to construct and use and operate a street railroad upon the streets designated therefor.

When it has granted its consent to a street railway company to construct and operate a railroad on the streets, there is left in the city the power, beyond all question, to grant a like consent to another street railroad company to construct and operate its railroad on the same streets, and there is nothing in the statute giving to the city authority to part with that power.

The granting away of that power or the parting with it, by contract or agreement, is not included in the authority to make regulations, terms and conditions as the condition of its consent.

The contemplation of the statute in relation to the regulations, terms and conditions which the city may impose is clearly that they (the regulations, terms and conditions) are limitations upon the terms of the consent granted, and are not an authority to make an additional grant.

They have reference to matters affecting the limit of time to which that consent extends, and to acts which may be done in the work of constructing and operating the road and charging tolls.

For instance, if the consent were given to construct and operate the road, without any regulations, terms and conditions being imposed, then the company might use its own judgment as to the kind of track it would use, the manner in which the track would be laid and maintained on the street, the kind of cars it would use, how they should be lighted and warmed, how often they should run and where they should stop, and other matters of like character.

It is under the power to make regulations, terms and conditions that matters of that character are intended to be controlled.

Citizens' Horse R. Co. vs. Belleville, 47 Ill. App., at 405, 406.

There is no implication of an intention in the statute that the city should grant to the company any greater right than that which is contained in the simple giving of the city's consent to construct and operate the company's road on the street, nor any implication that the city, in granting such consent, shall part with any of its legislative power over the streets, not necessarily involved by the giving of the consent specified in the statute.

In Railway Co. vs. Philadelphia, 101 U. S., 528, the opinion was delivered by Mr. Justice CLIFFORD. At the bottom of page 539 he says:

"Charters of private corporations duly accepted, it must be admitted, are in general executed contracts, but the different provisions, unless they are clear, unambiguous and free of doubt, are subject to construction, and their true intent and meaning must be ascertained by the same rules of interpretation as apply to other legislative grants, the universal rule being that whenever the privileges granted to such a corporation come under revision in the Courts, the grant is to be strictly construed against the corporation and in favor of the public, and that nothing passes to the orporation but what is granted in clear and explicit terms (Rice vs. Railroad Company, 1 Black., 358; Charles River Bridge vs. Warren Bridge, 11 Pet., 420).

"Whatever is not unequivocally granted in such charters is taken to have been withheld, as all such charters and acts extending the privileges of corporate bodies are to be taken most strongly against the corporators (Sedgwick, Stats. [2d Ed.], 292; Lees vs. The Manchester & Ashton Canal Co., 11 East., 644)."

In Fertilizing Company vs. Hyde Park, 97 U. S., 659, the opinion of the Court was delivered by Mr. Justice SWAYNE. He says at page 666:

"The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this Court."

In Stein vs. Bienville Water Supply Co., 141 U. S., 67, the Court said (p. 80):

"It is a settled rule of construction that, 'in grants by the public, nothing passes by implication;' and 'if, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the State; and where it is susceptible

of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the State."

In Grand Rapids Electric Light and Power Co. vs. Grand Rapids, &c., Co., 33 Fed. Rep., 659, the complainant claimed, under a grant by the city authorities, the exclusive right to light the streets of the city, and the Court said, Mr. Justice JACKSON delivering the opinion:

"It is conceded that, in the charter of Grand Rapids in force when said ordinance of 1880 was passed, there is no *express* power or authority conferred upon the Common Council to make such a grant of *exclusive* rights and privileges in, to, or over the streets of the city. The authority for the making of this *exclusive* grant must, therefore, as complainant's counsel properly admit, be found and sustained, if at all, upon what are called the *implied* powers of the Common Council. It is too well settled to need the citation of authorities in its support that municipal corporations, which are mere political agencies of the government, forming but parts of the machinery employed in carrying on the affairs of the State, possess and can exercise only *such* powers as are 'granted in *express words* or those *necessarily* or *fairly* implied, *in or incident to the powers expressly conferred, or those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable.*' Implied powers, says Judge COOLEY (Const. Lim., marg. p. 194) are such as are *necessary* in order to carry into effect those expressly granted, and which must therefore be presumed to have been within the intention of the legislative grant. The courts of the country, State and Federal, have not been disposed to extend or enlarge the power of municipalities by implication; on the contrary, they have, in the main, applied to their charter powers substantially the same rule of strict construction that is applied to charters of private incorporation, on the ground, as stated in Cooley's Constitutional Limitations (marg. p. 195), that 'the reasonable presumption is that the State has granted, in clear and unmistakable terms, all that it has designed to grant at all.'"

Mr. Justice JACKSON then cites from the opinion of this Court, delivered by Mr. Justice NELSON, in Minturn vs. Larue, 23 How., 436, as follows:

> "It is a well-settled rule of construction of grants by the Legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the Legislature must be resolved in favor of the public."

In Saginaw Gas Light Co. vs. Saginaw, 28 Fed. R., 529, the question of the power of the city authorities to grant to a gas company the exclusive privilege of lighting the streets of the city was passed upon by Mr. Justice BROWN, now of this Court. On page 535 he says:

> "But whether, under a charter simply authorizing a municipal corporation 'to cause its streets to be lighted,' it may grant an exclusive privilege of this description for a term of years, is a widely different question. Bearing in mind that the powers of the municipality are strictly limited by its charter, it is needful to inquire whether the grant of an exclusive franchise is a proper and reasonable method of exercising its authority to light the public streets and furnish gas to its inhabitants. We think it entirely clear that the city is not bound to manufacture and furnish the gas itself, but may contract with any individual or company for lighting the city, and, as an incident thereto, may authorize the use of its streets for laying pipes and mains. Indeed, this is not only a usual and convenient mode of exercising its power, but, in the general law for the organization of gas companies, it is expressly provided that such corporation shall have power to lay conductors, etc., with the consent of the municipal authorities of such city, town or village, under such reasonable regulations as they may prescribe. There is here an implied, if not an express, authority for the city to contract with any corporation which may be organized under the act.

"It is clear, however, that there is no authority expressly given to confer upon any corporation an exclusive right to occupy its streets for a number of years. It is true, it may, in effect, grant such exclusive right by refusing to any other company the franchise or privilege it has already granted to one, but this presupposes a continued and abiding consent on the part of the city to keep alive its contract, and is quite distinct from the right of the city to surrender its power to make another contract, and to vest in the plaintiff the right to determine for itself whether a rival company shall be permitted to enter its domain. While there is great force in plaintiff's argument that individuals would not be likely to incur the great expense of establishing gas works and laying pipes without some assurance of a profitable and continued employment for a sufficient length of time to remunerate them for their outlay, we think the law is too well settled that this cannot be done without express permission of the sovereign power to be now disturbed. If a grant of this kind for 30 years may be supported, why may it not, by parity of reasoning, be upheld for a hundred years, or in perpetuity?"

Again, on page 536, he says:

"We are not, however, without the direct authority for our proposition that nothing will be intended from a legislative grant to a municipal corporation."

Mr. Justice BROWN quotes from following cases:

"In Minturn vs. Larue, 23 How., 435, it was held that 'a charter authorizing the City of Oakland to establish and regulate ferries, or to authorize the construction of the same, gave no power to the city to grant an exclusive privilege.' In delivering the opinion Mr. Justice NELSON observed:

"'It is a well-settled rule of construction of grants by the Legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the Act, or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the Legislature must be resolved in favor of the public.'

"In the case of Wright vs. Nagle, 101 U. S., 791, to which reference has already been made, it was held that legislative power given to an inferior body to establish ferries and bridges did not authorize such body to grant the exclusive right to one person, though there was no doubt that the Legislature itself had authority to make such a grant. The case is upon all fours with the one under consideration.

"The same question was argued with great skill and thoroughness in State vs. Cincinnati Gas Light & Coke Co., 18 Ohio St., 262. In this case the charter conferred on the gas company power 'to manufacture and sell gas, to lay pipes,' etc., provided the consent of the city council be obtained for that purpose. Under a power given to the City Council of Cincinnati, to cause said city or any part thereof to be lighted with oil or gas,' and to levy a tax for that purpose, it contracted to invest the defendant with the full and exclusive privilege of using the streets, etc., for the purpose of lighting the city for the term of 25 years, and thereafter, until the city should purchase the works. It was held that, while there was no doubt that the city might by contract provide for lighting by gas, there was no necessity for making such right exclusive, and that the city had no authority to make the grant."

Again on page 539, he says: "It is scarcely necessary to say that, in the jurisprudence of Anglo-Saxon communities, gifts of the sovereign are treated with less consideration, and a totally different rule of interpretation obtains. Nothing is better settled than that statutes creating monopolies, granting franchises and charters of incorporation, must be construed liberally in favor of the public, and strictly as against the grantee. Monopolies are justly regarded as encroachments upon the natural rights of the people, and are viewed with jealousy by Courts. Whatever is not equivocally [unequivocally] granted in such act is taken to have been withheld. All acts of incorporation, and acts extending the privileges of incorporate bodies, are to be taken most strongly against the companies (Sedg. St. Law, 339).

"In regard to the rights of franchises, it is said by the Supreme Court that, where the grant is designed by the sovereign power to be a general benefit and accommodation to the public, if the meaning of the words be doubtful, they

shall be taken most strongly against the grantee and for the government, and, therefore, the grant is not to be extended, by implication, in favor of the grantee, beyond the obvious and natural meaning of the words employed. Other authorities, putting it sententiously, say that a doubt is fatal to a grant."

In Parkhurst vs. City of Salem, 32 Pac. R., 304, decided by the Supreme Court of Oregon, February, 1893, the question which is presented in the present case of the power of the city to grant the exclusive right to a street railroad company to lay its tracks in the city was the question involved.

The City of Salem was authorized by its charter

> " to permit, allow and regulate the laying down of tracks for street cars and other railroads upon such streets as the Council may designate, and upon such terms and conditions as the Council may prescribe " (p. 304).

It will be observed that these terms are substantially the same terms in which the authority of the City of Detroit is conferred by the Statute of Michigan. The Court states the question to be (p. 304) as follows : " The precise question then is : Had the City of Salem, under the grant of an exclusive power ' to permit, allow and regulate the laying down of tracks for street cars,' upon such terms and conditions as it may prescribe, the power to grant for a term of years the exclusive right to occupy its streets with street railroads ?"

After quoting from Justice BREWER'S decision above cited in 24 Fed. R. and other authorities from the Federal Courts, this language is used (p. 305) :

> " Now the charter of the City of Salem does not, in express terms, confer upon the city the power to grant an exclusive franchise for a street railway, nor can such power be implied, because it is not essential to carry into effect the powers expressly given (Barnett vs. Denison, 145 U. S., 135, 12 Sup. Ct. Rep., 819; Com. vs. Railway Co., 27 Pa. St., 339). The only power given is ' to permit, allow and regulate,' and this must be taken as the measure of its powers in the premises, and by all the authorities this is not sufficient to authorize the granting of exclusive franchises or privileges. It is true this power, so far as granted, is by the charter

made exclusive; that is, the city alone has the right and power to permit, allow and regulate the use of its streets for the purpose indicated. To this extent it is endowed with complete legislative sovereignty. That sovereignty has no limit so long as the city keeps within the powers granted. But the exclusive power 'to permit, allow and regulate' the laying down of car tracks is quite a different thing from the power to grant an exclusive permit for that purpose. The one case presupposes a continuing right and power in the city, to be exercised whenever, in the opinion of the council, the public conveniences or necessity may require, while the other is a right to delegate to some private individual or corporation a portion of the municipal authority over the streets, and vest the exclusive power in its grantee to permit the use of the streets by another railway. If the city has the power to grant an exclusive privilege for a street railway, it has, under the same section of the charter, like powers in reference to water and gas pipes, electric light and telephone wires and poles and many other enumerated powers. And, as Mr. Justice COLLEY says, in Gale vs. Kalamazoo, 23 Mich., 344: 'If it might do these things, it is easy to perceive that it might not be long before the incorporation itself, instead of being a convenience to its citizens, would have been used in various ways to compel them to submit to innumerable inconveniences, and would itself constitute a public nuisance of the most serious and troublesome description. Individual citizens, looking only to the furtherance of their private interests, might in various directions engage it in permanent contracts which, while ostensibly for the public benefits, should impose obligations precluding further improvements and depriving the town prospectively of those advantages and conveniences which the municipality was created to supply, and without which it is worthless. The charter of the City of Salem only confers upon the municipality the general power to permit or allow the use of its streets for street railway purposes and under such a power the adjudged cases are practically unanimous that the city cannot grant exclusive privileges.'"

After citing a great number of authorities the Court say (pp. 306, 307):

"The only cases to which we have been cited or have been able to find apparently holding a contrary doctrine are City of Newport vs. Newport Light Co., 84 Ky., 167, and Des Moines Ry. Co. vs. City of Des Moines, 73 Iowa, 513, 33 N. W. Rep., 610, and 35 N. W. Rep., 602, both of which have been criticised and declared to be contrary to the decided weight of authority, by BROWN, J., in Saginaw Gas Light Co. vs. Saginaw, *supra*, and JACKSON, J., in Grand Rapids E. L. & P. Co. vs. Grand Rapids, etc., *supra*, and are considered by Mr. McKinley, author of the article on 'Municipal Corporations' in the American and English Encyclopedia of Law, to be out of line with the authorities on the subject."

In State vs. The Cincinnati Gas Light Co., 18 Ohio St., 262, the claim was made on the part of the gas company to an exclusive right, under an ordinance of the City of Cincinnati, to use the streets for the purpose of laying down gas pipes and conveying gas for lighting the city. The Court held that the city had no power to grant such exclusive right, and, after considering the question of the power of the Legislature itself to grant such exclusive right, say (p. 293):

"And, assuming that such a power may be exercised directly, we are not disposed to doubt that it may also be exercised indirectly through the agency of a municipal corporation clearly invested for police purposes with the necessary authority. But we have referred to these authorities as our justification for saying that when a franchise so far in restraint of trade, and so pregnant with public mischief and private hardship, is drawn in question, and is claimed to be derived through a municipal ordinance or contract, the power of the municipal authorities to pass the ordinance or enter into the contract must be free from doubt. It must be found on the statute book in express terms, or arise from the terms of the statute by implication so direct and necessary as to render it equally clear."

In New Orleans, etc., R. Co. vs. City of New Orleans, 11 So. Rep., 78, the question was of the power of the city to grant the exclusive right to a street railroad company to construct its road

in the streets of New Orleans. In denying that the city possessed such power the Court say (p. 79):

> "The grant of power to the city council in this matter, under the charter of 1870, in force at the date of this contract, is found in Section 12, as follows: 'To regulate and make improvements in the streets, * * * to regulate the proper government of carts, drays, carriages, omnibuses and other vehicles of every description, freight, locomotive, passenger and street cars which run in the streets and within the limits of the city.' We have been referred to, and have ourselves been able to find, no authority holding that such a grant included a delegation of power to grant an exclusive right of way over streets to a railway company. The power to 'regulate the streets' is a persisting power, not exhausted by a single exercise thereof. The case of Brown vs. Duplesses, 14 La. Ann., 854, held that it was a proper exercise of this power of regulation for the city to authorize street railways to be established on the streets. If one Council, under this power to regulate, had the right to establish such a railway, it is difficult to understand why a succeeding Council, having precisely the same power, should not have the right to establish a similar railroad, when found necessary in the public interest, and provided always it did not destroy or impair the substance of the former grant.
>
> "The legislative grant to the City of New Orleans of the power to establish street railways is subject to the same construction which would be applied to a direct legislative grant to a private corporation for the same purpose, and as to the latter Judge DILLON says: 'A legislative grant of authority to construct a street railway is not exclusive unless so declared in terms, and, therefore, the Legislature may at will, and without compensation to the first company, authorize a second railway on the same streets or line, unless it has disabled itself by making the first grant irrepealable and exclusive' (2 Dill. Mun. Corp., 3d Ed., par. 727). The same principle must be applied in the construction of legislative delegations of authority to municipal corporations. Unless the terms of the delegation embrace expressly the power to grant exclusive rights, or are so sweeping as to operate a complete abdication of the whole legislative power in favor

of the corporation, it cannot be held to include such extraordinary power, the possession of which, even by the Legislature, is not free from dispute."

The cases of the City of Newport vs. Newport Light Co., 84 Ky., 167, and Des Moines R. Co. vs. City of Des Moines, 73 La., 513, are opposed to the above rule, but these cases are rejected by Mr. Justice JACKSON in the case of the Grand Rapids Electric Light Co. vs. Grand Rapids Light Co., 33 Fed. R., 659, above referred to, and by Mr. Justice BROWN in the case of Saginaw Gas Light Co. vs. Saginaw, 28 Fed. R., 536, *supra*.

Long vs. City of Duluth, 51 N. W., 913.
North Baltimore R. Co. vs. North Ave. R. Co., 23 At., 466.

Clearly then, as no authority had been expressly conferred upon the City of Detroit to grant the Detroit City Railway Company the exclusive right which the plaintiff in error claims for it, the City had no power to grant that exclusive right.

III.

The ordinance of November 24th, 1862, under which the plaintiff in error advances its claim, did not make a grant of an exclusive right to construct a railway in all the streets of the city.

We refer again to the ordinance which appears upon page 12 of the printed record. We there find that the grantees are exclusively authorized to construct and operate railways through certain designated streets, and "*through such other streets and avenues in said city as may from time to time be fixed and determined by a vote of the Common Council of said City of Detroit and assented to in writing by said corporation, organized as provided in Section 1 of this ordinance, and provided that the corporation does not assent in writing within thirty days after the passage of such resolution of the Common*

Council ordering the formation of new routes, then the Common Council may give the privilege to any other company to build such route."

The plaintiff in error claims that under this ordinance, as extended by the ordinance of November 14th, 1879, it has, as regards all the streets of the city, the exclusive right to construct and operate a street railroad subject to the terms imposed by the ordinance of 1862, and that the Common Council of Detroit cannot grant to any other street railroad company the right to construct and operate a street railroad in any street of the city until such street has been fixed and determined by a vote of the Common Council as a street upon which it desires to have a street railway built, and the plaintiff in error has neglected for a period of thirty days after the passage of the resolution, to accept in writing such right.

But this construction is not justified by the language of the act.

It is not a grant or consent or agreement that the Detroit City Railway, the predecessor of the plaintiff in error, should have exclusive rights, or first rights, in all the streets of the city. It is a grant of an exclusive right in the streets which are *specifically named in the ordinance* and also of an exclusive right in such other streets as the Common Council shall thereafter fix and determine as streets upon which it desires to have a street railway built by the Detroit City Railway and through which the Common Council shall order the formation of new routes. But, if the Common Council in any case has not fixed and designated the streets to be built upon and has not ordered the formation of new routes through those streets, such streets are not within the purview of the ordinance.

If it had been the purpose of the ordinance to grant to the Detroit City Railway an exclusive right to construct a street railroad in *all the streets* of the city, that intention would have been expressed in plain terms, such as would convey that meaning and no other, but the ordinance certainly does not do this and when read in the light of the rules governing the interpretation of grants to corporations, must be given the construction for which we contend.

See

Stein vs. Bienville Water Supply Co., 141 U. S., 67.
Long vs. City of Duluth, 51 N. W., 913.
North Baltimore Ry. Co. vs. North Avenue Ry. Co., 23 Atlantic Rep., 466.
Oregon Railway Co. vs. Oregonian Railway Co., 130 U. S., 1 at p. 26.

IV.

The ordinance of November 24th, 1862, relates solely to a road, the cars of which should be drawn by animals exclusively.

Section 7 of the Ordinance (p. 14 of the Printed Record) provides that "the cars to be used on said railways shall be drawn by animals only." If any exclusive right was granted by this ordinance it was the exclusive right to construct a horse railroad or railroad on which the motive power should be animal power. That right is not infringed by a grant from the city to another street railway company of the right to construct and operate an electric street railway in the same streets.

The fourth section of the Ordinance of 194, the operation of which is here sought to be enjoined, and which is found on page 37 of the Printed Record, enacts that "all street railways constructed, maintained and operated by the overhead trolley-wire system of electricity."

In Omaha Horse Railway Company vs. Cable Tramway Co., 30 Fed. Rep., 324, the complainant had an exclusive grant to construct and operate horse railways in the City of Omaha. Afterwards the right was granted to the defendant to construct and operate a cable tramway in the streets of Omaha. The Horse Railway Company sought to enjoin the Cable Tramway Company from constructing its road on the ground that the complainant had the exclusive right to construct street railways in the city. In deciding against the complainant the Court said:

> "The initial and important question is whether a cable tramway is within plaintiff's exclusive grant of a right to build, erect, and operate horse railways. If the grant were made to-day it could seriously be contended that it was so included. There is such a clear and recognized distinction between horse railroads and cable roads that, applying the ordinary rules for the construction of legislative grants, neither kind of road would be included within a grant of the other. The contention, however, is that at the time of this grant cable roads were practically unknown; that the only known form of street railways was the horse railway; that the

terms 'street railroad' and 'horse railroad' were in common parlance used to describe the same thing; that in construing the grant we are to place ourselves back to the time at which it was made, and these terms 'horse railroad' and 'street railroad' being then used interchangably for the same thing, we are to suppose that the Legislature meant by the use of one term all that it would have meant by the use of the other, and that therefore all that would to-day be included within either term was within the scope of the grant. The rule for the construction of legislative grants is well settled. They are to be construed against the grantee and in favor of the public; and nothing passes unless it is obvious that the intent was that it should pass. I do not mean they are to be construed technically and narrowly, so as to defeat the very purposes of the grant, but that, giving to language its ordinary meaning, nothing will be included unless obviously within the scope of such meaning. * * *

"This rule of construction against the grantee, which applies in all legislative grants, obtains with the greater force in a case like the one at bar, where the grant claimed is not merely the right to do something, but of a right to exclude all the rest of the public from doing that thing. He who says that the State has given him a franchise, a right to that which without that franchise he could not do, will be compelled to show that the franchise, the right claimed, is within the terms of his grant. Much more strenuous must be the demand upon him for clear and explicit language in his grant when he claims that a part of it is not merely the franchise, the right to do, but also the right to exclude all others of the public from exercising the same right, and the State, as the representative of the public, from according the right to another. * * *

"Now, placing ourselves back at the time of this grant, what should be attributed to the legislature as its intent? It may be assumed that the only form of street railway in practical use was the horse railway, and that in common parlance the two terms were often used interchangeably. Is it probable that it intended to foreclose the public in advance from all benefits of possible inventions and discoveries in the matter of street railway travel and give them to this grantee? Or did it not rather

intend that its grantee should take that complete and single thing known as a horse railway, with all of which it was familiar, and retain for the public all of the unknown possibilities of invention and discovery in reference to modes of street railway travel? Did it intend to give that which it knew nothing of, or only that which it knew? It seems to me that the mere stating of the question suggests the inevitable answer. Indeed, assuming the conditions to be all as stated, if the legislature had used the words 'street railway' instead of the term 'horse railway,' a very pertinent question would arise, whether it intended to grant an exclusive right to any other than that form of street railway—to wit, horse railway—with which it was familiar. We are bound to assume that the Legislature is dealing with the known and not with the unknown, and that when it grants a franchise it only intends to grant that of which it has knowledge, and it is unreasonable to lay stress on the form of language or the words used for the sake of broadening an intent so as to include things not then known."

In Teachout vs. Des Moines Street Railway Co., 38 N. W. Rep., 145, the same question was presented between a street railway company, called the Narrow Gauge Company, which had been granted the exclusive right to construct and operate street railways, whose cars were to be moved by animal power, and a street railway company called the Broad Gauge Company, which was subsequently granted the right to construct and operate railways by electricity. Deciding in favor of the latter company, the Supreme Court of Iowa said:

"It seems to us, keeping in mind the fundamental rule that corporations are invested with such powers only as are expressly conferred upon them, and such other powers as are necessary to carry out those expressly granted, there is little room for discussion or debate as to the powers conferred upon the Narrow Gauge Company by this ordinance. It has the exclusive right to operate its railways by animal power; and it has no more right to interpose objections to the building and operation of other street railroads, to be operated by other power, than if no grant of power has ever been made to it. The city, it is true, agreed by section 10 of the ordinance, that it would not 'confer upon any person or corporation any

privileges which will impair or destroy the rights and privileges herein granted to said company.' It is strenuously contended that the granting of the right to operate other street cars will necessarily impair the rights of the Narrow-Gauge Company, by diminishing its revenue, which is derived from the carriage of passengers. Perhaps this argument is sufficiently answered by the thought that, when the city made the conntract, based upon this ordinance, the parties thereto were dealing *with the known and not with the unknown*. It may well be questioned whether the city had any power to contract that no other means of public travel should be allowed upon the streets of the city except by cars drawn by horses for the period of thirty years. If so, the establishment of hack lines, or omnibus lines, or other means of public conveyance, would impair the revenue of the Narrow-Gauge Company, and thus impair its rights under this ordinance. Its right is to operate a horse railroad. It is entitled to the exclusive right to do so, and to use all improvements that may be made thereto; but to nothing more. The city cannot impair that right; but it does not follow that it may not authorize other means of street travel. It did not undertake to confer upon the co pany the right to carry all the passengers who might desire to travel by public conveyance upon the streets; and it did not by the ordinance contract that new and improved and undiscovered methods of travel might not be adopted as the public wants might demand. This ordinance and contract were made by the city in behalf of the public, and it should not be so construed as to fetter and prevent the right to use new methods and appliances, the result of the inventive genius of the age, or to apply the discovery and application of the latent powors of nature to the uses of man."

These cases are directly in point and against the claim of the plaintiff in error in the case at bar.

Nor is the plaintiff's claim helped by the third section of the ordinance of the Common Council of the City of Detroit, approved January 3d, 1889, and found on page 30 of the printed record, by which permission is given to the Detroit City Railway, the predecessor of plaintiff in error, " whenever it shall deem it advisable, to substitute in lieu of animal power such system of electric or other

motive power, except steam, as shall seem best in its judgment for the purpose of properly and safely conducting its business in said Cityof Detroit upon any or all of its said lines now in use and operatd, or hereafter to be in use and operated, by said company."

This ordinance does not grant or attempt to grant to the Detroit City Railway an exclusive right to construct and operate electric railroads in all streets, nor does it enlarge any exclusive grant of the Ordinance of November 24th, 1862, so as to make it still apply in case the Detroit City Railway should become an electric road.

V.

The unanimous opinion of the Supreme Court of Michigan in this cause will be found at page 469 of the Printed Record, and it seems quite useless to attempt to add to the sound reasoning and conclusion of that opinion.

VI.

The decree of the Supreme Court of Michigan should be affirmed.

PHILIP A. ROLLINS,
JOSEPH H. CHOATE,
Of Counsel for the City of Detroit, Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

THE DETROIT CITIZENS' STREET RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE CITY OF DETROIT, and THE DETROIT RAILWAY,
Defendants in Error.

BRIEF FOR THE DETROIT RAILWAY—DEFENDANT.

The plaintiff in error claims that it acquired by purchase the exclusive right to construct and maintain street railways in all of the streets of the City of Detroit, and that the city, by virtue of an ordinance approved November 24th, 1862, surrendered all power to grant authority to any other street railway company to construct or maintain a street railway in any of the streets of the city, until after the Common Council had designated the streets through which it desired a street railway constructed, and offered to plaintiff the first opportunity to construct such railway.

If plaintiff's claim be sustained, it establishes a complete monopoly of the right to construct and operate a street railway in any of the streets of the City of Detroit.

November 24th, 1862, an ordinance was approved grant-

ing to H. K. Sanger and his associates, organized into a corporation, consent and authority to lay a single or double track railway on and along the course of the streets therein specifically mentioned.

Section 2 of said ordinance provides that the said grantees, by the provisions of this ordinance, are exclusively authorized to construct and operate railways, as herein provided, on and through Jefferson and other streets named, "and through such other streets and avenues in said city as may from time to time be fixed and determined by vote of the Common Council of said City of Detroit, and assented to in writing by said corporation, organized as provided in section 1 of this ordinance, and provided the corporation does not consent in writing within thirty days after the passage of said resolution of the council, ordering the formation of new routes, then the Common Council may give the privilege to any other company to build such route, and such other company shall have the right to cross any track or rails already laid, at their own cost and expense."

The plaintiff, The Detroit Citizens' Street Railway Company, claims to have acquired all the rights originally granted by the ordinance of November 24th, 1862, including the extension of said exclusive rights for thirty years from November 14th, 1879.

On December 4th, 1894, the Common Council of the City of Detroit adopted an ordinance granting its consent to the defendant, the Detroit Railway, to construct and operate a street railway on certain designated streets in the City of Detroit. The streets upon which the Detroit Railway tracks were constructed, and particularly enumerated in the ordinance aforesaid, are not named in the original ordinance claimed by plaintiff or in any ordinance for the construction of a railway in the City of Detroit, the right to which is now claimed by plaintiff.

The Detroit City Railway was organized May 9th, 1863, for the purpose of carrying into effect the ordinance of November 24th, 1862, under the Train Railway Act of Michigan.

Laws of 1855, p. 338, as amended by the Laws of 1861, p. 11.

The original Train Railway Act did not authorize the organization of street railways, but the amendment of 1861 authorized the organization of such companies and the construction and operation of street railways in and through the streets of any town or city in the State. This law was amended in 1867, section 34, so as to read as follows:

"All companies or corporations formed for such purposes shall have the exclusive right to use and operate any street railways, constructed, owned or held by them: *Provided*, That no such company or corporation shall be authorized to construct a *railway* under this Act through the streets of any town or city, without the consent of the municipal authorities of such town or city, and under such regulations, and upon such terms and conditions as said authorities may from time to time prescribe: *Provided, further*, That after such consent shall have been given *and accepted by the company* or corporation to which the same is granted, such authorities shall make no regulations or conditions whereby the rights or franchises so granted shall be destroyed or unreasonably impaired, or such company or corporation be deprived of the right of constructing, maintaining and operating such railway *in the street in such consent or grant named pursuant to the terms thereof.*"

Laws of 1867, p. 257.

Plaintiff claims substantially:

First—That the Common Council of the City of Detroit in 1862 had authority to grant to the Detroit City Rail-

way the exclusive right to construct and operate street railways in all the streets of the city, for a period of forty-seven years, to-wit, from November 24th, 1862, to November 24th, 1909, and that no succeeding council could grant authority to any other street railway company to construct and operate a street railway on any street in the city, without the permission of the Detroit City Railway.

Second—That the construction and operation of the railway by defendant, under the ordinance adopted by the Council December 4th, 1894, infringes the exclusive rights held by plaintiff.

I.

The legislation by the Common Council of the City of Detroit, and the acquiescence of the Detroit City Railway, constitute a rejection of the plaintiff's rights and claim made in this cause under the Ordinance of November 24th, 1862, and such legislation and conduct sustains the position taken by the defendant.

(A) When the ordinance of November 24th, 1862, was adopted, the City of Detroit embraced a very small territory, and a population of less than fifty thousand. Very few, if any, of the streets mentioned in the ordinance granted to the defendant were then laid out or established as public highways. To-day the territory of the city has been extended so as to embrace many times that of its original dimensions, and its population has increased to upwards of three hundred thousand. The changes that have been wrought since 1862 have been wonderful. Its streets, then of but a few miles in length and limited in number, have been extended until they cover over five hundred miles, reaching out into what were then cultivated fields, but now lined with spacious

dwellings. The methods and customs of the people have changed. From slowly hauled horse cars and five cent fares, we have come to a modern equipment of rapid running electric railways, at a greatly reduced rate of fare, of vast importance to the people.

The evidence establishes the fact that many of the streets specifically named in the original ordinance, were abandoned, and the right to construct a street railway upon such streets subsequently granted to other street railway companies.

Testimony of C. M. Burton, pp. 303, 304.
Maps, Exhibits "A" and "B," pp. 303, 304.

On the 3rd day of January, 1865, an ordinance was granted to the Fort Wayne & Elmwood Street Railway Company for the construction and operation of a street railway on Fort street and several other streets, which was put into operation and is still maintained as a separate corporation.

Exhibit "15," p. 380.

On the 1st day of May, 1868, an ordinance was granted to the Grand River Avenue Street Railway Company to construct on Grand River and Woodward avenues a street railway, which was duly constructed and operated under such ordinance for upwards of twelve years, by a corporation organized for such purpose, before the same was purchased by plaintiff.

Exhibit "24," p. 387.

On the 28th day of March, 1873, an ordinance was adopted granting to the Detroit Western Transit Railway Company the right to construct and operate a street railway on certain streets not mentioned in plaintiff's original ordinance.

Exhibit "35," p. 398.

The Common Council, from time to time, adopted ordinances by which it gave consent to the construction of street railways by other companies upon highways not specifically named in plaintiff's original ordinance, in substantially the same manner that defendant received and accepted the ordinance under which its railway was constructed, to wit:

To the Grand Trunk Junction Street Railway on Congress, Larned and other streets June 13th, 1873.

Exhibit "37," p. 404.

To the Central Market, Cass Avenue and Third Street Railway.

R., pp. 330, 249, 250.

To the St. Aubin Street Railway on St. Aubin avenue, July 11th, 1873.

Exhibit "38," p. 407.

To the Highland Park Railway on Woodward avenue, from railroad crossing northerly to city limits, July 13th, 1886.

Exhibit "39," p. 411.

It is admitted by plaintiff that all of the foregoing franchises were granted and lines constructed and operated upon the streets mentioned in said ordinances by said companies, many of them for a period of several years, and subsequently their rights and property acquired by plaintiff.

The Common Council proceedings show that no protest or objection was made to the Common Council by the Detroit City Railway to the adoption of any of the above mentioned ordinances, with a single exception.

(B) It will appear from the evidence that all grants of authority to construct a railway on additional streets to those specifically mentioned in the original ordinance of

the Detroit City Railway were given by a special grant of the Common Council, subject to conditions other than those of the ordinance of November 24th, 1862, and in each case a written acceptance of such terms of the ordinance by said company is required, *and in no instance was there ever a designation of streets or laying out of routes by the Common Council under the Ordinance of November 24th, 1862, and giving plaintiff's company thirty days to consent thereto, nor did plaintiff or its predecessor ever request, during all these years, the Common Council to lay out additional street railway routes, as they now claim was contemplated by the terms of the Ordinance of November 24th, 1862.*

Record, pp. 355, 356, 359.

(C) *The undisputed evidence shows that the street railway lines constructed and operated by the defendant were necessary to meeet the public demand;* that plaintiff took no steps to supply, prior to the granting of the ordinance of December 4th, 1894, the needs of the public, that such lines are not competitors of plaintiff's lines, and do not materially affect the traffic upon or value of plaintiff's railway.

Testimony H. A. Evertt, pp. 86, 87.
Testimony H. C. Ludden, City Engineer, p. 93.

(D) Section 2 of the ordinance of 1862 provides for the construction of railways on certain streets mentioned and "through such other streets and avenues in said city as may from time to time be fixed and determined by vote of the Common Council. * * * *ordering the formation of new routes*, then the Common Council may give the privilege to another company," etc.

This is *not* a grant, consent or agreement that plaintiff shall have *first* rights in *all* the streets of the city, but only

the exclusive right in the streets *specifically named*, and such other streets as the Common Council shall *thereafter fix and determine as streets which it desires to have a street railway built upon by plaintiff and for which the Council shall order the formation of new routes.* Until the Common Council shall establish new routes, designate new streets, and order the construction of a railway thereon by plaintiff, no rights or privileges can be claimed by plaintiff under Section 2 of said ordinance.

(E) In order to give effect to plaintiff's claim under the ordinance, it must be admitted that plaintiff holds the right to elect whether it will build a street railway upon any streets which the city or the people may deem necessary for the accommodation of the public traffic.

Admitting its validity, we submit that with the most liberal construction of the language referred to in the ordinance, the city reserved the right to give its consent for the construction of other street railways in the public highways of the city, as the welfare and accommodation of the public might require from time to time.

II.

If plaintiff was granted any exclusive rights under the ordinance, it was limited to the terms, conditions and provisions of the entire ordinance, and consequently the exclusive right, if any, was limited to horse railways; "The cars to be used on said railway shall be drawn by animals only, at a rate of speed not exceeding six miles per hour."

This grant, even if admitted to be exclusive, is not infringed by the grant to defendant to construct and operate an electric street railway. Defendant's rights are limited to *electric street railways only*, and, therefore, not a violation of plaintiff's grant.

In the opinion in the case of Omaha Horse Railway Company vs. Cable Tramway Company (30 Fed. R., 327, 328), the following language, directly in point, was used:

"The initial and important question is whether a cable tramway is within plaintiff's exclusive grant of a right to build, erect and operate horse railways. If the grant were made to-day, it could not seriously be contended that it was so included. There is such a clear and recognized distinction between horse railroads and cable roads that, applying the ordinary rules for the construction of legislative grants, neither kind of road would be included within a grant of the other. The contention, however, is that at the time of this grant cable roads were practically unknown; that the only known form of street railways was the horse railway; that the terms 'street railroad' and 'horse railroad' were in common parlance used to describe the same thing; that in construing the grant we are to place ourselves back to the time at which it was made, and these terms, 'horse railroad' and 'street railroad' being then used interchangeably for the same thing, we are to suppose that the legislature meant by the use of one term all that it would have meant by the use of the other, and that therefore all that would to-day be included within either term was within the scope of the grant. The rule for the construction of legislative grants is well settled. They are to be construed against the grantee and in favor of the public; and nothing passes unless it is obvious that the intent was that it should pass. I do not mean that they are to be construed technically and narrowly, so as to defeat the very purpose of the grant, but that, giving to language its ordinary meaning, nothing will be included unless obviously within the scope of such meaning. * * *

"This rule of construction against the grantee, which applies in all legislative grants, obtains with the greater

force in a case like the one at bar, where the grant claimed is not merely the right to do something, but of a right to exclude all the rest of the public from doing that thing. He who says that the State has given him a franchise, a right to do that which without that franchise he could not do, will be compelled to show that the franchise, the right claimed, is within the terms of his grant. Much more strenuous must be the demand upon him for clear and explicit language in his grant when he claims that a part of it is not merely the franchise, the right to do, but also the right to exclude all others of the public from exercising the same right, and the State, as the representative of the public, from according the same right to another. * * *

"Now, placing ourselves back at the time of this grant, what should be attributed to the legislature as its intent? It may be assumed that the only form of street railway in practical use was the horse railway, and that in common parlance the two terms were often used interchangeably. Is it probable that it intended to foreclose the public in advance from all benefits of possible inventions and discoveries in the matter of street railway travel, and give them to this grantee? Or, did it not rather intend that its grantee should take that complete and single thing known as a horse railway, with all of which it was familiar, and retain for the public all of the unknown possibilities of invention and discovery in reference to modes of street railway travel? Did it intend to give that which it knew nothing of or only that which it knew? It seems to me that the mere stating of the question suggests the inevitable answer. Indeed, assuming the conditions to be all as stated, if the legislature had used the words 'street railway' instead of the term 'horse railway' a very pertinent question would arise, whether it intended to grant an exclusive right to any other than

that form of street railway, to wit: horse railway, with which it was familiar. We are bound to assume that the legislature is dealing with the known and not with the unknown, and that when it grants a franchise it only intends to grant that of which it has knowledge; and it is unreasonable to lay stress on the form of language or the words used for the sake of broadening an intent so as to include things not then known."

This important case was followed by the case of Teachout vs. Des Moines Street Railway Company, 36 Am. and Eng. R. Cas. 108, involving the same question. They conclusively sustain the position of defendant in this case.

III.

The Common Council of the City of Detroit had no power to grant to the Detroit City Railway the exclusive right to construct and operate street railways in all of the streets of the city, as claimed by virtue of the Ordinance of November 24th, 1862.

1st. The following quotation from the argument of Hon. Benton Hanchett, counsel for the Detroit Railway, in the Circuit and Michigan Supreme Court, in support of the foregoing proposition, clearly sustains the decision of the State court:

"The city has no proprietary rights in the streets. Its power over the streets is a legislative power held in trust for the benefit of the public. It is a continuing power, to be exercised from time to time as the public interest may require. *Except so far as the city is specially authorized by the legislature,* the city cannot part with, diminish or limit that power by contract, or grant, or in any other way. Any contract attempted to be made having such effect is void. The power remains in the city, to be

exercised in the same manner and to the same extent as if such contract had not been attempted.

1 Dillon Mun. Corp. (3 ed.), Sec. 97, 457.
2 Dillon Mun. Corp., Sec. 680, 683.
Cooley on Const. Lim., pp. 248, 252 (6 ed.)
Gale vs. Village of Kalamazoo, 23 Mich., 344, at 353, 354.
Detroit vs. Detroit City Railway Co., 76 Mich., 421, at 425.
Meriwether vs. Garrett, 102 U. S., 472, at 501, 511, 513.
Mayor of Macon vs. Hough, 60 Ga., 221.
City of Jacksonville vs. Jacksonville R. R., 67 Ill., 540, at 543, 544.
Warren vs. Mayor of Lyons, 27 Ia., 351, at 355.
Kings Co. Fire Ins. Co. vs. Stevens, 101 N. Y., 441, at 416.
Marsh vs. Fulton Co., 10 Wall., 676, at 684.
Nash vs. Lowry, 37 Minn., 261, at 263.
Milhan vs. Sharp, 27 N. Y., 611.
Birmingham, etc., R. R. Co. vs. Birmingham St. R. Co., 79 Ala., 465, at 472, 473.
Webb vs. City of Demopolis, 13 Southern R., 288, at 295, 297.
Lake Roland Elevated R. Co. vs. Mayor of Baltimore, 54 A. & E. R. Cases, 11.
Cozzler vs. Georgetown, 6 Wheat., 93.
Illinois Cent. R. Co. vs. Ill., 146 U. S., 387.
Long vs. City of Duluth, 51 N. W., 913, 914.
North Baltimore, etc., R. Co. vs. North Ave. R. Co., 23 At., 466, 469.
Stein vs. Bienville Water Supply Co., 141 U. S., 67, 80, 81.

2d. Municipal corporations have no power to grant exclusive rights to street railway or other companies except upon authority from the legislature, explicitly and clearly expressed. Statutes of this character must be strictly construed.

Booth on Street Railways, Sec. 108.
Grand Rapids E. L. & P. Co. vs. Grand Rapids, etc., Co., 33 Fed. Rep., 659.

Jackson vs. Interstate R'y Co., 24 Fed. Rep., 306.
Saginaw Gas Light Co. vs. Saginaw, 28 Fed. Rep., 529.
Parkhurst vs. City of Salem, 32 Pac. Rep., 304.
Long vs. Duluth, 51 N. W. Rep., 913
Cook on Stockholders, Sec. 913.

This court has declared the well established rule on this subject in Ottawa vs. Carey, 108 U. S., 121. Chief Justice Waite, speaking for the court in that case said:

"Municipal corporations are created to aid the State in the regulation and administration of local affairs. They have only such powers of government as are expressly granted them or such as are necessary to carry into effect those that are granted. No powers can be implied except such as are essential to the objects and purposes of the corporation as created and established."

See also

Taylor vs. Railway, 80 Mich., 77.
People vs. Hurlbut, 24 Mich., 69.

Statutes creating monopolies, granting franchises and charters, must be construed liberally, in favor of the public, and strictly against the grantee.

The power conferred by the legislature upon the Common Council cannot be surrendered by contract. It holds the power in trust for the benefit of the people, to be exercised again and again as circumstances change from time to time. The courts have invariably sustained and preserved the future exercise of such power, and there is nothing in the statute giving the state authority to part with such power.

Counsel for plaintiff concede by their argument in this cause that no express or direct authority was ever con-

ferred by the Legislature of Michigan upon the Common Council of Detroit, to grant the exclusive privilege to occupy the streets of the city for street railway purposes, claimed under the ordinance in question.

IV.

Counsel for plaintiff assert "That the State Constitution takes the sovereign power of the State over public streets from the Legislature and vests it in the city."

Defendant contends that the city possessed no power to grant the right claimed by plaintiff unless authorized so to do by the Legislature.

The provisions of the Constitution upon this subject are as follows:

Section 9 of article 14 provides that "The State shall not be a party to, or interested in, any work of internal improvement, nor engaged in carrying on any such work, except in the expenditure of grants to the State of lands, or other property."

Section 23, article 4, provides, "The Legislature shall not authorize, by private or special law, the sale or conveyance of any real estate belonging to any person; nor vacate or alter any road laid out by commissioners of highways, or any street in any city or village, or in any recorded town plat."

Sections 13 and 14, of article 15, are as follows:

"Section 13. The Legislature shall provide for the incorporation and organization of cities and villages, and shall restrict their powers of taxation, borrowing money, contracting debts and loaning their credit."

"Section 14. Judicial officers of cities and villages shall be elected, and all other officers shall be elected or ap-

pointed, at such time and in such manner as the Legislature may direct."

Section 38, article 4, is as follows:

"Sec. 38. The Legislature may confer upon organized townships, incorporated villages and cities, and upon the boards of supervisors of the several counties, such powers of a local legislative and administrative character as they may deem proper."

These constitutional provisions do not vest municipal corporations with authority to grant franchises over public highways. On the contrary, Section 38, above mentioned, expressly reserves such power to the Legislature.

These constitutional provisions have received construction by the courts in the following cases:

People vs. Supervisors Ingham Co., 20 Mich., 102.

People vs. Hulbert, 24 Mich., 44.

Auditor General vs. Lothrop, 24 Mich., 235.

Hubbard vs. Township Springwells, 25 Mich., 153.

Board of Park Com. vs. Detroit, 28 Mich., 228.

Attorney General vs. Common Council of Detroit, 29 Mich., 108.

Attorney General vs. Common Council of Detroit, 58 Mich., 213.

Metropolitan Police vs. Board of Auditors, 68 Mich., 576.

Davies vs. Board of Supervisors, 89 Mich., 295.

Taylor vs. Street Railway Co., 80 Mich., 77.

In the consideration of these constitutional provisions by the United States Circuit Court of Appeals in the case of the City of Detroit vs. Detroit Citizens' Street Railway Company, et al., 64 Fed. Rep., 628-642, the Court says:

"It is impossible to draw from these provisions any recognition of inherent or ungranted authority in either the

townships, villages or cities of Michigan. That they do have the effect to limit materially the ordinary powers of Legislatures over the purely local affairs of such communities is most obvious. It is equally obvious that in regard to purely local affairs, the Legislature can only act by conferring discretionary power in regard to such subjects upon the local authorities. *If the Legislature wishes to confer or withold such power it may do so. If it shall deem such powers expedient, it may confer them with such limitations as it shall deem wise.*"

In conclusion we submit:

First, that under the Constitution of the State of Michigan the power of a municipality to grant a franchise in a public highway to a street railway *is not inherent, but is wholly derived from the Legislature.*

Second, that the statutes of the State of Michigan do not confer upon the Common Council of a city *the right to grant an exclusive privilege* to occupy the streets for street railway purposes.

Third, that the exclusive right or first option claimed by plaintiff under the ordinance in question is void.

JOHN B. CORLISS,
Counsel for Detroit Railway, Defendant.

OPINION

DETROIT CITIZENS' STREET RAILWAY COMPANY *v.* DETROIT RAILWAY.

48
ed 67
692

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 236. Argued April 26, 27, 1898.—Decided May 23, 1898.

At the time when the plaintiff in error received from the city of Detroit exclusive authority to construct and operate its railways in that city, the common council of Detroit had no power, either inherent or derived from the legislature, to confer an exclusive privilege thereto.

THE plaintiff in error is a street railway company of the State of Michigan, organized for the purpose of owning and operating lines in the city of Detroit, and is the successor in interest of a similar corporation named the Detroit City Railway. The rights asserted by it arise from an ordinance of the common council of that city passed upon November 24, 1862. This provided that the Detroit City Railway was "exclusively authorized to construct and operate railways as herein provided, on and through" (certain specified streets) "and through such other streets and avenues in said city as may from time to time be fixed and determined by vote of the common council of the said city of Detroit and assented to in writing by said corporation. . . . And provided the corporation does not assent in writing, within thirty days after the passage of said resolution of the council ordering the formation of new routes, then the common council may give the privilege to any other company to build such route."

The ordinance provided also that "the powers and privileges conferred by the provisions of this ordinance shall be limited to thirty years from and after the date of its passage."

Section 2 of the ordinance is only necessary to be quoted, and it is inserted in the margin.[1]

[1] SEC. 2. The said grantees are, by the provisions of this ordinance, exclusively authorized to construct and operate railways as herein provided, on and through Jefferson, Michigan and Woodward avenues, Witherell, Gratiot, Grand River and Brush or Beaubien streets; and from Jefferson

Statement of the Case.

There is also inserted in the margin sections 33 and 34 of the Tram Railway Act.[1] Howell's Stats. 1882, c. 94, Title 16.

By an ordinance passed November 14, 1879, it was provided further that "the powers and privileges conferred and obligations imposed on the Detroit City Railway Company by the ordinance passed November 24, 1862, and the amend-

---

avenue through Brush or Beaubien streets to Atwater street; and from Jefferson avenue, at its intersection with Woodbridge street, to Third street; up Third street to Fort street and through Fort street to the western limits of the city; and through such other streets and avenues in said city as may from time to time be fixed and determined by vote of the common council of the said city of Detroit, and assented to, in writing, by said corporation, organized as provided in section first of this ordinance. And provided, The corporation does not assent, in writing, within thirty days after the passage of said resolution of the council ordering the formation of new routes, then the common council may give the privilege to any other company to build such route, and such other company shall have the right to cross any track of rails already laid, at their own cost and expense; Provided, always, that the railways on Grand River street, Gratiot street and Michigan avenue shall each run into and connect with the Woodward avenue railways, in such direction that said railways shall be continued down to, and form, each of them, one continuous route to Jefferson avenue; Provided, always, that said railroad down Gratiot street may be continued to Woodward avenue, through State street, or through Randolph street, and Monroe avenue and the Campus Martius, as the grantees, or their assigns, under this ordinance may elect.

[1] SEC. 33. It shall be competent for parties to organize companies under this act to construct and operate railways in and through the streets of any town or city in this State.

SEC. 34. All companies or corporations formed for such purposes shall have the exclusive right to use and operate any street railways constructed, owned or held by them; Provided, that no such company or corporation shall be authorized to construct a railway under this act through the streets of any town or city without the consent of the municipal authorities of such town or city and under such regulations and upon such terms and conditions as said authorities may from time to time prescribe; Provided, further, that, after such consent shall have been given and accepted by the company or corporation to which the same is granted, such authorities shall make no regulations or conditions whereby the rights or franchises so granted shall be destroyed or unreasonably impaired, or such company or corporation be deprived of the right of constructing, maintaining and operating such railway in the street in such consent or grant named, pursuant to the terms thereof.

ments thereto, are hereby extended and limited to thirty years from this date."

On November 20, 1894, the common council passed an ordinance granting to several third parties the right to construct street railways upon portions of certain streets upon which the plaintiff in error was maintaining and operating street railways, and also the right to construct, maintain and operate railways on certain other streets, alleys and public places in the city of Detroit, without giving to plaintiff in error the opportunity to decide whether it would construct the same. The present suit was brought in the circuit court for the county of Wayne and State of Michigan, to enjoin the grantees named in the latter ordinance, and also the city, from acting thereunder, upon the ground that it impaired the contract between the city and the plaintiff in error arising from the ordinances first aforesaid. The bill was dismissed, and, on appeal to the Supreme Court of the State, the decree of dismissal was affirmed. From that decree the present writ of error has been duly prosecuted to this court.

There are five assignments of error. They present the contention that the grant to the plaintiff in error was a contract within the protection of the provision of the Constitution of the United States, which prohibits any State from passing any law impairing the obligation of a contract, and that the subsequent grant to the defendant in error, the Detroit Railway, was a violation and an impairment of the obligation of that contract.

Mr. John C. Donnelly, *Mr. H. M. Duffield* and *Mr. Frederic A. Baker* for plaintiff in error. *Mr. Michael Brennan*, *Mr. David Willcox* and *Mr. Frank Sullivan Smith* were on the plaintiff in error's briefs.

Mr. John B. Corlies, *Mr. Charles Flowers* and *Mr. Joseph H. Choate* for defendants in error. *Mr. Philip A. Rollins* was on their brief.

Mr. Justice McKenna, after stating the case, delivered the opinion of the court.

Opinion of the Court.

The controversy turns primarily upon the power of the city of Detroit over its streets, whether original under the constitution of the State, and hence as extensive as it would be in the legislature, or whether not original but conferred by the legislature, and hence limited by the terms of the delegation. The first proposition is asserted by the plaintiff in error; the second proposition by the defendants in error.

The provisions of the constitution which are pertinent to the case are as follows:

"The State shall not be a party to or interested in any work of internal improvement, nor engaged in carrying on any such work, except in the expenditure of grants to the State of land or other property.

"There shall be elected annually on the first Monday of April in each organized township . . . one commissioner of highways . . . and one overseer of highways for each highway district.

"The legislature shall not . . . vacate or alter any road laid out by the commissioners of highways, or any street in any city or village, or in any recorded town plat.

"The legislature may confer upon organized townships, incorporated cities and villages, and upon boards of supervisors of the several counties such powers of a local, legislative and administrative character as they may deem proper."

The Supreme Court of Michigan, in its opinion, 68 N. W. Rep. 304, interprets these provisions adversely to the contention of plaintiff in error, and, reviewing prior cases, declares their harmony with the views expressed. "The scope of the earlier decisions," the court said, "is clearly stated by Mr. Justice Cooley in *Park Commissioners* v. *Common Council*, 28 Michigan, 239. After stating that the opinion in *People* v. *Hurlbut* had been misapprehended, Justice Cooley said: 'We intended in that case to concede most fully that the State must determine for each of its municipal corporations the powers it should exercise, and the capacities it should possess, and that it must also decide what restrictions should be placed upon these, as well to prevent clashing of action and interest in the State as to protect individual corporators

against injustice and oppression at the hands of the local majority. And what we said in that case we here repeat — that, while it is a fundamental principle in this State, recognized and perpetuated by expressed provisions of the constitution, that the people of every hamlet, town and city of the State are entitled to the benefits of local self-government, the constitution has not pointed out the precise extent of local powers and capacities, but has left them to be determined in each case by the legislative authority of the State from considerations of general policy, as well as those which pertain to the local benefit and local desires. And in conferring those powers it is not to be disputed that the legislature may give extensive capacity to acquire and hold property for local purposes or it may confine authority within the narrow bounds; and what it thus confers it may enlarge, restrict or take away at pleasure.'"

This decision of the Supreme Court of Michigan is persuasive if not authoritative; but, exercising an independent judgment, we think it is a correct interpretation of the constitutional provisions. The common council of Detroit, therefore, had no inherent power to confer the exclusive privilege claimed by the plaintiff in error.

Did it get such power from the legislature? It is contended that it did by the act under which the Detroit City Railway Company, the predecessor of plaintiff in error, was organized, and to whose rights and franchises it succeeded. This act is the Tram Railway Act, and at the time of the adoption of the first ordinance in 1862, section 34 of that act provided that "all companies or corporations formed for such purposes [the railway purposes mentioned in the act] shall have the exclusive right to use and operate any railways constructed, owned or held by them: Provided, that no such company or corporation shall be authorized to construct a railway, under this act, through the streets of any town or city, without the consent of the municipal authorities of such town or city, and under such regulations and upon such terms and conditions as said authorities may from time to time prescribe."

Opinion of the Court.

In 1867 the further proviso was added that, after such consent should be given and accepted, such authorities should make no regulations or conditions whereby the rights or franchises so granted should be destroyed or unreasonably impaired, or such company be deprived of the right of constructing, maintaining and operating such railway.

It is clear that the statute did not explicitly and directly confer the power on the municipality to grant an exclusive privilege to occupy its streets for railway purposes. It is urged, however, that such power is to be inferred from the provision which requires the consent of the municipal authorities to the construction of a railway under such terms as they may prescribe, combined with the provisions of the constitution, which, if they do not confer a power independent of the legislature, strongly provide for and intend local government. The argument is strong, and all of its strength has been presented and is appreciated, but there exist considerations of countervailing and superior strength. That such power must be given in language explicit and express, or necessarily to be implied from other powers, is now firmly fixed. There were many reasons which urged to this — reasons which flow from the nature of the municipal trust — even from the nature of the legislative trust, and those which, without the clearest intention explicitly declared — insistently forbid that the future should be committed and bound by the conditions of the present time, and functions delegated for public purposes be paralyzed in their exercise by the existence of exclusive privileges. The rule and the reason for it are expressed in *Minturn* v. *Larue*, 23 How. 435; *Wright* v. *Nagle*, 101 U. S. 791; *State* v. *Cincinnati Gas Light and Coke Co.*, 18 Ohio St. 262; *Parkhurst* v. *Salem*, 32 Pac. Rep. 304; *Saginaw Gas Light Co.* v. *Saginaw*, 28 Fed. Rep. 529, decided by Mr. Justice Brown of this court; *Long* v. *Duluth*, 51 N. W. Rep. 913. See also *Grand Rapids Electric Light and Power Co.* v. *Grand Rapids &c. Co.*, 33 Fed. Rep. 659, opinion delivered by Mr. Justice Jackson at circuit. As bearing on the rule, see also *Oregon Railway & Navigation Co.* v. *Oregonian Railway Co.*, 130 U. S.

1; *Central Transportation Co.* v. *Pullman Palace Car Co.*, 139 U. S. 24.

The power, therefore, must be granted in express words or necessarily to be implied. What does the latter mean? Mr. Justice Jackson, in *Grand Rapid &c. Power Co.* v. *Grand Rapid &c. Co.*, *supra*, says: . . . "that municipal corporations possess and can exercise only such powers as are 'granted in *express words*, or those *necessarily* or *fairly* implied, *in or incident to the powers expressly conferred, or those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable.*'" The italics are his. This would make "necessarily implied" mean inevitably implied. The Court of Appeals of the Sixth Circuit, by Circuit Judge Lurton, adopts Lord Hardwicke's explanation, quoted by Lord Eldon in *Wilkinson* v. *Adam*, 1 Ves. & B. 422, 466, that "a necessary implication means not natural necessity, but so strong a probability of intention, that an intention contrary to that, which is imputed to the testator, cannot be supposed." If this be more than expressing by circumlocution an inevitable necessity, we need not stop to remark; or if it mean less, to sanction it, because we think that the statute of Michigan, tested by it, does not confer on the common council of Detroit the power it attempted to exercise in the ordinance of 1862. To refer the right to occupy the streets of any town or city to the consent of its local government was natural enough — would have been natural under any constitution not prohibiting it, and the power to prescribe the terms and regulations of the occupation derive very little if any breadth from the expression of it. But assuming the power to prescribe terms does acquire breadth from such expression, surely there is sufficient range for its exercise which stops short, or which rather does not extend to granting an exclusive privilege of occupation. Surely there is not so strong a probability of an intention of granting so extreme a power that one, contrary to it cannot be supposed, which is Lord Hardwicke's test, or that it is indispensable to the purpose for which the power is given or necessarily to be implied from it which is the test of the cases. The rule is one

of construction. Any grant of power in general terms read literally can be construed to be unlimited, but it may, notwithstanding, receive limitation from its purpose — from the general purview of the act which confers it. A municipality is a governmental agency — its functions are for the public good, and the powers given to it and to be exercised by it must be construed with reference to that good and to the distinctions which are recognized as important in the administration of public affairs.

Easements in the public streets for a limited time are different and have different consequences from those given in perpetuity. Those reserved from monopoly are different and have different consequences from those fixed in monopoly. Consequently those given in perpetuity and in monopoly must have for their authority explicit permission, or, if inferred from other powers, it is not enough that the authority is convenient to them, but it must be indispensable to them.

Decree affirmed.

Mr. Justice Shiras did not hear the argument and took no part in the decision.